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MINNESOTA REPORTS

VOL. 43

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MINNESOTA

FEBRUARY—JUNE, 1890.

GEORGE B. YOUNG

REPORTER

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**SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE
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Rec. Nov. 17, 1890.

JUDGES.

OF THE

SUPREME COURT OF MINNESOTA

DURING THE TIME OF THESE REPORTS.

HON. JAMES GILFILLAN, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. DANIEL A. DICKINSON.
HON. CHARLES E. VANDERBURGH.
HON. LOREN W. COLLINS.

JOHN D. JONES, Esq., Clerk.

ATTORNEY GENERAL,
HON. MOSES E. CLAPP.

(iii)

By Gen. St. 1878, c. 27, § 2, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on Gen. St. 1878, c. 63, § 4, the head-note in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision, and the date of the decision is indicated at the head of each case.

In the citations from the first twenty volumes of the Minnesota Reports, the page of the original edition is given, preceded by the corresponding page of the recent edition edited by Chief Justice Gillan.

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water, 17 Wis. 198,	423	Yost v. American Ins. Co., 39 Mich.	28
Ward v. State, 2 Mo. 120,	255	581,	
v. 43M—b		Young v. Dake, 5 N. Y. 463,	168, 169

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MINNESOTA.

MORTIMER MORIARTY *vs.* ROBERT ASHWORTH.

February 17, 1890.

Waste by Mortgagor—Injunction.—Waste upon real estate, by a mortgagor in possession, will not be enjoined unless the acts complained of may so impair the value of the property as to render it insufficient, or of doubtful sufficiency, as security for the debt. But the value of the property should remain largely in excess of the debt secured by it.

Appeal by plaintiff from a judgment of the district court for Stearns county, where the action was tried by *Baxter, J.*

Oscar Taylor, for appellant.

Reynolds & Stewart, for respondent.

DICKINSON, J. This is an action to restrain the defendant from quarrying and disposing of granite rock from land mortgaged by the defendant to the plaintiff, in April, 1887, to secure a debt of \$1,000, to become due two years after that time. The land is of the area of four acres. Its principal value is in the granite quarry thereon. The removal of this material depreciates the value of the land to the extent of such removal; but the quarrying by the defendant has not been carried on to such an extent as to so far impair the value of the land as to render it insufficient security for the plaintiff's debt, nor has he threatened to do so. The court, finding the facts to be substantially as above stated, considered that the plaintiff was not

entitled to an injunction. On this appeal we are only to consider whether, upon the facts found, the legal conclusion of the court was right.

While some authority may be found in support of the claim of the appellant that a mortgagee is entitled to an injunction restraining any acts of waste by a mortgagor in possession which may diminish the value of the mortgaged property, yet the great weight of authority, both in England and in this country, is to the effect that equity will not interfere in such cases unless the acts complained of are such as may render the security insufficient for the satisfaction of the debt, or of doubtful sufficiency. *King v. Smith*, 2 Hare, 239; *Humphreys v. Harrison*, 1 Jac. & W. 581; *Hippesley v. Spencer*, 5 Madd. 422; *Harper v. Aplin*, 54 Law T. (N. S.) 383; *Coker v. Whitlock*, 54 Ala. 180; *Scott v. Wharton*, 2 Hen. & M. (Va.) 25; *Buckout v. Swift*, 27 Cal. 433; *Vanderslice v. Knapp*, 20 Kan. 647; *Harris v. Bannon*, 78 Ky. 568; *Van Wyck v. Alliger*, 6 Barb. 507, 511; Snell, Eq. 304; 1 Wats. Comp. Eq. 746; 2 Story, Eq. Jur. § 915; High, Inj. (2d Ed.) §§ 693, 694; Bisp. Eq. (4th Ed.) § 433; 1 Jones, Mortg. (4th Ed.) § 684; 1 Lead. Cas. Eq. (4th Am. Ed.) 992, 1021; Kerr, Inj. (2d Amer. Ed.) 84. In numerous other cases we find that the courts, in stating the grounds upon which equity will interfere, seem to regard it as a necessary condition that the sufficiency of the security be threatened. See *Cooper v. Davis*, 15 Conn. 556; *Gray v. Baldwin*, 8 Blackf. 164; *Hastings v. Perry*, 20 Vt. 272; *Fairbank v. Cudworth*, 33 Wis. 358. From the proposition which we have stated as an established principle of equity, it is not to be understood that equity will not interfere unless the acts threatened are such as may reduce the value of the mortgaged property *below* the amount of the debt. On the contrary, as was considered in *King v. Smith*, 2 Hare, 239, we think that the mortgagee is entitled to be protected from acts of waste which would so far impair the value of the property as to render the security of *doubtful* sufficiency. He is entitled to have the mortgaged property preserved as sufficient *security* for the *payment of his debt*, and it is not enough that its value may be barely equal to the debt. That would not ordinarily be deemed sufficient as security to one whose purpose is to secure payment, and not to

become a purchaser of the property at its market value. And not only must it be considered that the mortgage is held to secure payment of the debt, and not for the purpose of converting the mortgagee into a purchaser, but that if the debt is not yet mature it is to be considered whether, during the time which may elapse before maturity, the present value of the property may not become depreciated from causes not now known. It does not appear that the court in this case failed to regard these considerations.

Judgment affirmed.

FRANK ROBERT, JR., and another *vs.* WESTERN LAND ASSOCIATION.

February 17, 1890.

Taxes—Sufficiency of Redemption Notice—Statement of Amount.—

A notice of the expiration of the time for redemption from a tax-sale considered as showing the amount for which the land had been sold, the amount of the tax, penalty, and interest, for which the land was sold, being stated, and also that that sum, with interest and subsequent taxes, the amount being stated, was required to be paid to redeem.

Same—Trivial Error.—An error in stating, in such a notice, the period from which interest was to be computed, the result of which would be trivial in amount, (some two or three cents,) should be disregarded.

Same—Rate of Interest.—The rate of interest *held* to be sufficiently stated.

Action brought in the district court for St. Louis county, the plaintiffs alleging ownership in fee of lot 265 of block 31, of "Rice's Point," and that defendant claims some right therein through tax sales and certificates, and asking that defendant set up its claims and that they be adjudged void. Defendant answered, claiming title in fee under tax sales and certificates. The action was tried by *Stearns, J.*, who ordered judgment for defendant, which was entered, and the plaintiffs appealed.

Cant & Brigham and *Charles Bechhoeffer*, for appellants.
Walter Ayers, for respondent.

DICKINSON, J. This appeal involves the question of the sufficiency of a county auditor's notice of the expiration of the time for redemption from a tax-sale. The tax-sale was on the 20th day of September, 1880, under a tax judgment entered on the 13th day of August of that year. The notice in question, given pursuant to Laws 1877, c. 6, § 37, (Gen. St. 1878, c. 11, § 121,) is claimed to have been defective for the reasons (1) that it does not state the amount for which the land was sold; and (2) that the statement of the amount required to redeem is inaccurate, uncertain, and contrary to the requirements of the statute. The notice states that the land therein described "was, at the tax-sale on September 20th, 1880, under tax judgment of August 13th, 1880, sold for the taxes of the year 1879, amounting, with penalties, to 67-100 dollars, which sum, with interest from the date last mentioned at the rate of 18 per cent. per annum, and subsequent delinquent taxes and penalties and interest thereon, amounting to the sum, in all, of one and 51-100 dollars, which last-mentioned sum, and interest thereon from date, is the amount required to redeem said piece or parcel of land from said sale, exclusive of costs to accrue upon this notice, and that the redemption period will expire sixty days after the service of this notice."

While the notice does not state in direct terms the amount for which the land was sold, it does show that it was sold for the amount of the tax and penalties, and that is stated to be 67 cents. This is involved in the clause (not framed grammatically) following the statement of the amount of the tax and penalties. "*Which sum* [it says] with interest * * * and subsequent delinquent taxes, * * * amounting to the sum in all of one and 51-100 dollars, *which last-mentioned sum* and interest * * * *is the amount required to redeem.*" The predicate, "is," in this sentence, has two subjects, or, rather, the same subject is repeated in a different form. This form of notice is not to be commended, but it would hardly be a fair construction of it to hold that it does not show the amount for which the land was sold.

The notice was erroneous in specifying the date of the judgment, instead of the date of the sale, as the time from which interest was to run, so that the statement of the amount required to redeem was a little over one cent too much. Such trifles are not regarded in the

law. See *Western Land Ass'n v. McComber*, 41 Minn. 20, (42 N. W. Rep. 543,) in which the same question was involved. The defect was not substantial. The same is to be said of the claim that by the terms of the notice interest was computed to the date of the notice, and that interest was to be charged on that interest from that time. This would be erroneous, but the amount of the error in this case would be too trifling to be noticed.

The notice shows that to the sum stated as necessary to redeem, interest will be added from the date of the notice, but the rate of the interest to be thus added is not specifically stated. We think, however, that, if it be necessary to state what rate of interest the law prescribes in such case, it sufficiently appears in the preceding part of the notice, in which the rate of interest chargeable prior to the notice is specified.

Judgment affirmed.

W. H. H. JOHNSTON vs. JOHN N. JOHNSON.

February 17, 1890.

Vendor and Purchaser—Abandonment of Contract.—Under a contract for the sale of land, providing for the payment of a part of the price within 20 days after an abstract showing a clear title should be presented to the purchaser, upon which payment the conveyance was to be made, if the vendee notifies the vendor that he is unable, for want of funds, to perform the contract on his part, he may be deemed to have relinquished his rights under it; and the vendor need not, in order to put the vendee in default, present an abstract of title or tender a deed. In such case it is not important that there was a cloud upon the title which the vendor was able and willing at once to remove.

Appeal by defendant from a judgment of the district court for Dakota county, where the action was tried by *Crosby, J.*

Chas. N. Akers, for appellant.

Johns, Michael & Johns, for respondent.

DICKINSON, J. This is an action to cancel a contract for the sale of land. The case is presented here upon the pleadings and the findings of the court. It thus appears that on May 31, 1887, the plaintiff and one Gray, then owning the land, executed a contract with the defendant for the sale of the property to him for the sum of \$18,000, of which \$450 was to be paid at that time, and was so paid. Five thousand five hundred and fifty dollars was to be paid within 20 days after the delivery of an abstract showing a clear title, (at which time of payment the conveyance was to be made,) and the remainder of the price was to be paid subsequently. It was agreed that time should be of the essence of the contract. The abstract presented by the vendors showed that an action was then pending in which one Hamilton claimed title to a part of the land. The plaintiff, however, had arranged with Hamilton for a settlement of that action, and the defendant was notified of this. The vendors were willing and able to perform their part of the contract with the defendant, and the latter was so notified. The defendant, however, was not able to perform on his part, for the reason that he could not furnish the money necessary to be paid, and for that reason he did not comply with the contract on his part. He notified the vendors of his inability to perform, and in October, 1887, they contracted to sell the land to other parties. The plaintiff has acquired the interest of Gray in the land. The judgment of the district court was that the contract be cancelled, and that the defendant was not entitled to recover the \$450 paid on the contract. It must be assumed that the findings of fact were supported by the evidence. The findings justified the conclusion and judgment. It is true that by the terms of the contract the defendant was under no obligation to make further payments until the vendors' title should be shown to be good; but, disregarding a defect which he was notified could be removed, he declared his own inability to perform the contract. This justified the vendors in forbearing to remove the cloud of the *lis pendens*. There was no necessity for their presenting a clear abstract of title or tendering a deed, when, for reasons wholly foreign to the matter of the title, the vendee had notified them that he could not perform. As they were willing and

able to fulfil the contract on their part, and so notified the defendant, the substantial reason for its non-performance was the defendant's declared inability to make the payment. He, then, and not they, were properly regarded as being in default. Therefore the judgment was right.

Judgment affirmed.

In the Matter of C. A. WELCH, Insolvent.

February 17, 1890.

Insolvency—Fraudulent Disposal of Property—Distribution without Releases.—An application by creditors of an insolvent debtor, under the statute, for leave to share in the estate without filing releases, should be denied, unless there has been a fraudulent concealment, disposal, or encumbering of property with intent to defraud creditors. An honest inability on the part of the debtor to account for the manner in which his property has been expended, does not justify granting such an application.

Same — Purchase of Homestead in Wife's Name.—The purchase of a homestead by the debtor and procuring the title to be conveyed to his wife, even though a statutory trust may result in favor of creditors, is not a sufficient ground for such an order, in the absence of the fraudulent intent specified in the insolvent law.

Same—Estoppel—Statements to Creditors.—Upon the hearing on such an application, the debtor is not estopped to deny his having ever had property which he had previously included in a statement of his property made to his creditor, and on the faith of which credit was given.

David Bradley & Co. (a corporation) made application to the district court of Big Stone county for an order for distribution of the estate of C. A. Welch (who, on January 13, 1888, had made an assignment under the insolvent law) without the filing of releases by the creditors. An order to show cause was thereupon issued by C. L. Brown, J., and upon the return-day testimony was taken before him, and after argument the application was denied, from which

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order the creditor appealed. The evidence showed that Welch had been in business at Graceville, in Big Stone county, for about four years before the assignment, dealing in lumber, wagons, buggies, ploughs, and sleds, and being agent for Wood's self-binders. He began with \$1,300 cash invested in his business and with no debts. He kept no records of sales (except sales on credit) nor any cash-account. He estimated that the profits on sales were about 25 per cent., less about 10 per cent. for bad debts. He could not state and had no record of the amount of goods bought within the two years next preceding the assignment. Some of the lumber bought on credit was used in building a house on a lot bought by him with his own money, (\$135,) the title being taken in his wife's name, and the premises, after the house was built, being occupied and claimed as a homestead. The entire cost of the premises was about \$1,000. He could not account for the disappearance of the profits made in his business, and the discrepancy between the amount on hand and what should be on hand, but stated that he spent a good deal of money in building a house, spent a winter in Texas, trying to dispose of property there, and kept three children at school away from home at a cost which he estimated at from \$1,500 to \$2,000 for the two years, and his wife and one child spent a winter in Virginia, which cost him a good deal. His family expenses, aside from his children's schooling, were from \$1,500 to \$2,000 a year. The \$1,300 with which he began business he got from his wife; he afterwards put into the business \$1,000, the proceeds of a note, making \$2,300 in all. In the autumn of 1887 he became embarrassed. The verified schedules to the assignment showed accounts receivable, \$2,148.87; lumber, buggies, wagons, and sleighs, \$3,102.17; real estate, (in Graceville, not including the homestead,) \$800; lumber sheds, wagon-scales, safe, and office furniture, \$278,—in all \$6,329.04. His indebtedness—all being for lumber, buggies, wagons, etc.,—was \$10,386.01. On May 18, 1887, he made to David Bradley & Co. a written statement of his financial condition on that day, showing real estate in Texas, \$10,000; personal property in Graceville, \$1,500; merchandise in store, \$2,000; good notes and accounts, \$4,500—in all \$19,000; and showing a total indebtedness of \$3,200, and stating that he was

"worth above all debts, \$15,800." In this statement he also agreed to notify David Bradley & Co. immediately upon any change in his business matters, whereby his net worth should be in anywise diminished. The debt to that creditor (\$605.66) was for goods sold on the day of the statement and subsequently. As to this statement the insolvent testified that he did not own the Texas land and had no interest in it; that it belonged to his mother, from whom he had a power of attorney to sell it, and by whom he was authorized to use the proceeds of any sale in his business; that when he made the statement he had effected a sale of the land, but the sickness of one of the purchasers broke up the sale. He expected, if he made the sale, to use the entire proceeds (\$8,000) in his business. "My mother did not expect me to have the money out and out, but I had the privilege of using it in the business."

Geo. D. Emery, for appellant.

E. F. Crawford and Kitchel, Cohen & Shaw, for respondent.

DICKINSON, J. This is an appeal from an order of the district court denying the petition of a creditor of an insolvent debtor for leave to share in the estate without filing releases. The question of fact presented to the district court upon such an application, under section 10 of the insolvent law of 1881, (Laws 1881, c. 148,) is as to whether the insolvent debtor has "fraudulently concealed, or fraudulently incumbered or disposed of, any of his property with intent to cheat and defraud his creditors." To entitle the petitioning creditor to an order dispensing with the requirement to file a release, there must have been a fraudulent concealment, disposal, or incumbrance of property, and with the intent to cheat and defraud creditors. Mere negligence or want of prudence in business affairs, living beyond one's income, or honest inability to show fully how his property has been expended and disposed of, do not necessarily entitle the creditor to such an order. These things are not necessarily inconsistent with good faith and honesty of purpose. In the case before us, while the debtor was confessedly unable to account for the disappearance of a considerable amount of property, it appeared that he kept no general books of account, except for charges for goods sold on credit; never made such an examination as to inform himself as to his financial

condition; and made large expenditures for family expenses, without knowing what they amounted to. The case is such that the finding of the district judge, that there had not been any concealment or disposal of property with fraudulent intent, should not be disturbed on appeal.

The mere purchase of a lot of land, and constructing a residence on it, which became the debtor's homestead, and paying for these out of the proceeds of his business, was not a fraudulent concealment or disposal of his property, entitling the debtor to the order sought. It was not even shown that he was *then* insolvent. Though it be conceded that, because the title to the land so purchased was conveyed to the wife of the purchaser, a trust may have resulted in favor of his creditors, as provided by Gen. St. 1878, c. 43, § 8, that alone does not avail the creditor in this application. This is not a proceeding to have such a trust declared, nor to enforce it; and it is immaterial whether or not the facts may have been such as to give rise to a resulting trust, if those facts do not present also a case within the provisions of the insolvent law above recited; that is, the transaction must involve the fraudulent intent specified, in order to bring it within the scope of the proviso in section 10.

There was no error in allowing the debtor in this proceeding to testify that in fact he never owned some of the property named in the schedule, Exhibit D, which he had previously presented to this creditor as showing the property then owned by him, and on the faith of which credit had been given. That statement was not a written contract, the terms of which could not be contradicted by parol evidence, but a mere representation of a fact, having no other effect than if it had been made orally. The debtor was not estopped by the statement from showing in this proceeding that in fact he never had such property. An element wanting to create an estoppel preventing the debtor testifying to the truth in this proceeding, is prejudice to the creditor, if he be not now permitted to avail himself of the estoppel. The creditor never purchased the property referred to in the schedule, and has no right to resort for the payment of his debt to property never owned by the debtor. Nor in this proceeding does he seek to do so. The question of fact is here presented whether the debtor

owned this property, and has fraudulently concealed or disposed of it. The creditor is prejudiced by allowing the debtor to now set forth the truth, only in this way: If the debtor's mouth is now closed, it will *appear* from his former representation that he had this property; and from the fact that it was not included in the assignment, and perhaps from other circumstances, it may be claimed to have been proved that there has been a fraudulent concealment or disposal of it; and for that reason the creditor should have the right specified in the proviso to section 10 of the statute. On the other hand, if the truth be disclosed, only a case of fraudulent representation will be shown; and for that the statute does not allow the remedy here sought. In other words, the only prejudice to the creditor from allowing the truth to be stated is that by that means he will be prevented from obtaining a legal remedy upon a state of facts which does not perhaps exist. Of course, if there was a fraudulent representation, the creditor may have been prejudiced by that; but that is not the question here. He suffers no prejudice, in contemplation of the law, from the disclosure of the truth in this inquiry concerning the facts. Whatever remedy he may have for the fraud may be pursued, but the doctrine of estoppel is not applicable to make a fraudulent representation the cause for legal relief which the statute allows only upon other grounds.

Order affirmed.

LOUIS T. STENSGAARD vs. JOHN SMITH.

February 17, 1890.

Contract—Mutuality—Writing Appointing Exclusive Agent—Revocation.—The plaintiff received from the defendant a writing, unilateral in form, and signed only by the defendant, declaring that, in consideration of the plaintiff agreeing to act as agent for the sale of certain land, he (defendant) thereby gave to plaintiff the exclusive right for three months to sell the same, and promised to pay a stated commission for making a sale. Instrument construed as not being a contract, for want of mutuality, but as conferring present authority to sell the land, but

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revocable at any time before a sale should be effected, unless plaintiff should complete a contract by such an acceptance of the defendant's offer as would place him under obligation to act as agent for the period named.

Same—Acts of Agent Held not to Show Agreement on his Part.—The mere receiving of this writing by plaintiff did not import an agreement on his part to so act as agent, nor did the fact that he tried for a month to sell the land fix upon him that obligation, for such conduct is referable to the naked present power to sell, and proof of such facts by plaintiff was insufficient to sustain an averment of a *contract* entered into.

Action brought in the district court for Ramsey county, to recover \$13,000 damages for breach of the alleged contract set forth in the opinion, the complaint alleging that immediately after the date of such contract the land described in it rapidly increased in value, and within the period of three months designated in such contract the land was worth in market and could and would have been sold by plaintiff for \$30,000, except for defendant's breach of the contract on January 12, 1887, by conveying the land to another. At the trial, before *Kelly, J.*, a verdict was directed for defendant at the close of plaintiff's case. A new trial was refused, and plaintiff appealed.

John W. Willis and Charles A. Willard, for appellant.

Kueffner & Fauntleroy, for respondent.

DICKINSON, J. This action is for the recovery of damages for breach of contract. The rulings of the court below, upon the trial, were based upon its conclusion that no contract was shown to have been entered into between these parties. We are called upon to review the case upon this point. The plaintiff was engaged in business as a real-estate broker. On the 11th of December, 1886, he procured the defendant to execute the following instrument, which was mostly in printed form:

"ST. PAUL, Dec. 11, 1886.

"In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property hereinafter mentioned, I have hereby given to said L. T. Stensgaard the exclusive sale, for three months from date, the following property, to wit: [Here follows a description of the property, the terms of sale, and some other provisions

not necessary to be stated.] I further agree to pay said L. T. Stensgaard a commission of two and one-half per cent. on the first \$2,000, and two and one-half per cent. on the balance of the purchase price, for his services rendered in selling of the above-mentioned property, whether the title is accepted or not, and also whatever he may get or obtain for the sale of said property above \$17,000 for such property, if the property is sold.

"JOHN SMITH."

The evidence showed that the plaintiff immediately took steps to effect a sale of the land, posted notices upon it, published advertisements in newspapers, and individually solicited purchasers. About a month subsequent to the execution by the defendant of the above instrument, he himself sold the property. This constitutes the alleged breach of contract for which a recovery of damages is sought.

The court was justified in its conclusion that no contract was shown to have been entered into, and hence that no cause of action was established. The writing signed by the defendant did not of itself constitute a contract between these parties. In terms indicating that the instrument was intended to be at once operative, it conferred present authority on the plaintiff to sell the land, and included the promise of the defendant that, if the plaintiff should sell the land, he should receive the stated compensation. This alone was no contract, for there was no mutuality of obligation, nor any other consideration for the agreement of the defendant. The plaintiff did not by this instrument obligate himself to do anything, and therefore the other party was not bound. *Bailey v. Austrian*, 19 Minn. 465, (535;) *Tarbox v. Gotzian*, 20 Minn. 122, (139.) If, acting under the authority thus conferred, the plaintiff had, before its revocation, sold the land, such performance would have completed a contract, and the plaintiff would have earned the compensation promised by the defendant for such performance. *Andreas v. Holcombe*, 22 Minn. 339; *Ellsworth v. Southern Minn. Ry. Extension Co.*, 31 Minn. 543, (18 N. W. Rep. 822.) But so long as this remained a mere present authorization to sell, without contract obligations having been fixed, it was revocable by the defendant. The instrument does, it is true, commence with

the words: "In consideration of L. T. Stensgaard agreeing to act as agent for the sale of the property," etc.; but no such agreement on the part of the plaintiff was shown on the trial to have been actually made, although it was incumbent upon him to establish the existence of a contract as the basis of his action. This instrument does not contain an agreement on the part of the plaintiff, for he is no party to its execution. It expresses no promise or agreement except that of the defendant. It may be added that the language of the "consideration" clause is not such as naturally expresses the fact of an agreement having been already made on the part of the plaintiff. Of course, no consideration was necessary to support the present, but revocable, authorization to sell. It is difficult to give any practical effect to this clause in the construction of the instrument. It seems probable, in the absence of proof of such an agreement, that this clause had no reference to any actual agreement between these parties, but was a part of the printed matter which the plaintiff had prepared for use in his business, with the intention of making it effectual by his own signature. If he had appended to this instrument his agreement to accept the agency, or even if he had signed this instrument, this clause would have had an obvious meaning.

This instrument, executed only by the defendant, was effectual, as we have said, as a present, but revocable, grant of authority to sell. It involved, moreover, an offer on the part of the defendant to contract with the plaintiff that the latter should have, for the period of three months, the exclusive right to sell the land. This action is based upon the theory that such a contract was entered into; but, to constitute such a contract, it was necessary that the plaintiff should in some way signify his acceptance of the offer, so as to place himself under the reciprocal obligation to exert himself during the whole period named to effect a sale. No express agreement was shown. The mere receiving and retaining this instrument did not import an agreement thus to act for the period named, for the reason that, whether the plaintiff should be willing to take upon himself that obligation or not, he might accept and act upon the revocable authority to sell expressed in the writing; and, if he should succeed in effecting a sale before the power should be revoked, he would earn the commis-

sion specified. In other words, the instrument was presently effectual and of advantage to him, whether he chose to place himself under contract obligations or not. For the same reason the fact that for a day or a month he availed himself of the right to sell conferred by the defendant, by attempting to make a sale, does not justify the inference, in an action where the burden is on the plaintiff to prove a contract, that he had accepted the offer of the defendant to conclude a contract covering the period of three months, so that he could not have discontinued his efforts without rendering himself liable in damages. In brief, it was in the power of the plaintiff either to convert the defendant's offer and authorization into a complete contract, or to act upon it as a naked revocable power, or to do nothing at all. He appears to have simply availed himself, for about a month, of the naked present right to sell if he could do so. He cannot now complain that the land-owner then revoked the authority, which was still unexecuted. It may be added that there was no attempt at the trial to show that the plaintiff notified the defendant that he was endeavoring to sell the land; and there is but little, if any, ground for an inference from the evidence that the defendant in fact knew it.

The case is distinguishable from those where, under a unilateral promise, there has been a performance by the other party of services, or other thing to be done, *for which*, by the terms of the promise, compensation was to be made. Such was the case of *Goward v. Waters*, 98 Mass. 596, relied upon by the appellant as being strictly analogous to this case. In the case before us, compensation was to be paid only in case of a sale of the land by the plaintiff. He can recover nothing for what he did, unless there was a complete contract; in which case, of course, he might have recovered damages for its breach.

Order affirmed.

NOTE. A motion for a reargument of this case was denied April 9, 1890.

WILLIAM CLEVELAND *vs.* SAMUEL A. BOOTH, impleaded, etc.

February 17, 1890.

Mortgage—Coupon Note—Action by Coupon-Holder to Foreclose.—

The holder of overdue coupon interest notes, secured by mortgage, may maintain an action to foreclose the mortgage, although the principal debt is not yet mature, and is held by another person, who is made a party to the suit.

Appeal by defendant Booth (impleaded with Mrs. Wm. B. Hamilton) from an order of the district court for Hennepin county, *Hooker*, J., presiding, overruling his separate demurrer to the complaint.

R. B. Forrest, for appellant.

Armstrong Taylor, for respondent.

DICKINSON, J. This is an appeal from an order overruling a demurrer to the complaint in an action to foreclose a mortgage. For the understanding of the issue of law thus presented, a summary of the facts more fully set forth in the complaint will be sufficient. The mortgage was given to secure a promissory note, together with several coupon notes for the interest to become due on the principal note. It contained a power of sale, to be exercised in case of default in payment of the principal or interest, or of any part thereof. By successive conveyances from the mortgagor, all of which were made subject to the mortgage, the land has come to this defendant Booth, who now owns it subject to the mortgage. The mortgage, through several intermediate assignments, has been transferred to the other defendant, Mrs. Hamilton. But, prior to the assignment to her, a former holder of the mortgage detached several of the coupon notes, which have been assigned to the plaintiff, and which are past due. The principal debt was not mature when the plaintiff, as the holder of such coupon notes, commenced this action to foreclose the mortgage. The defendant Booth alone prosecutes this appeal. The complaint states a cause of action. The plaintiff was entitled to foreclose for the secured interest notes due and unpaid, although the principal was not yet mature. Gen. St. 1878, c. 81, §§ 3, 4; *Fowler v. John-*

son, 26 Minn. 338, (3 N. W. Rep. 986, and 6 N. W. Rep. 486.) Neither is the relief of a foreclosure to be denied plaintiff because the principal debt is held by another person. The latter is made a party to this action, and her rights will not be disregarded. In what precise form relief will be granted is a matter not now to be considered.

Order affirmed.

STATE OF MINNESOTA, *ex rel.* MOSES E. CLAPP, Attorney General, *vs.*
SIOUX CITY & NORTHERN RAILROAD COMPANY.

February 17, 1890.

Corporations—Fees for Filing Articles—Iowa Railway Companies.—

Held, that the provisions of Laws 1889, c. 225, apply to Iowa railway companies who accept the provisions of Laws 1877, c. 14, and that such companies are required, as a condition precedent to filing their articles of association with the secretary of state, to pay into the state treasury the fees prescribed by the act of 1889.

Quo Warranto. Respondent demurs to the information.

Moses E. Clapp, Attorney General, for the State.

Daniel Rohrer, for respondent.

MITCHELL, J. Chapter 14, Laws 1877, provided that "any railroad organized, or that may be hereafter organized, under the laws of the state of Iowa, is hereby authorized to extend and build its road into the state of Minnesota; and such railroad company shall have and possess all the powers, franchises, and privileges, and be subject to the same liabilities, of railroad companies organized and incorporated under the general laws of this state: *provided* such non-resident company shall first file a true copy of its articles of incorporation with the secretary of this state, and *shall comply with the laws of Minnesota as to filing and recording its articles of incorporation.*" On March 28, 1889, another act was passed (Laws 1889, c. 235) which provided, generally, that any railroad company organized

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under the laws of other states is authorized, *upon being incorporated in this state as hereinafter provided*, to build and extend its road into this state, and shall have and possess all the powers and franchises, and be subject to the same liabilities, as railroad corporations organized and incorporated under the general laws of this state: *provided* such railway company shall first file in the office of the secretary of this state a copy of its articles of organization or incorporation, and shall comply with the law of this state as to filing and recording its articles of incorporation; that upon and after the filing of its said articles, which shall be deemed an acceptance of the benefits of the act, the said corporation "*is hereby declared to be a legal domestic corporation.*" A third act was passed April 24, 1889, (Laws 1889, c. 225,) which took effect May 1st of the same year, providing "that no corporation or association * * * shall hereafter be created or organized under the laws of this state, unless the persons named as corporators therein shall, at or before the filing of the articles of association or incorporation, pay into the state treasury the sum of fifty dollars for the first \$50,000, or fraction thereof, of the capital stock of such corporation or association, and the further sum of five dollars for every additional \$10,000, or fraction thereof, of its capital stock." The respondent was organized as a corporation under the laws of Iowa, October 3, 1887, with a capital stock of \$10,000,000, for the purpose of constructing and operating a railroad from Sioux City, in that state, to the south boundary of Minnesota, and thence through this state to Duluth. In the summer of 1889, it constructed and is now operating, in this state, a portion of its line of road, and assumes to possess, and is exercising in this state, all the powers and franchises of domestic railway corporations, claiming the right to do so under the act of 1877. Its articles of association have never been filed with the secretary of this state, but subsequently to May 1, 1889, it tendered to him a copy of the same, and requested him to receive and file them; but he declined to do so unless the company would first pay to the state treasurer \$5,025, the percentage on its capital stock required by Laws 1889, c. 225. This the company declined to do, claiming that the provisions of this act did not apply to it, as not being a corporation

"created and organized under the laws of this state," but one created and organized under the laws of Iowa; and the correctness of this contention is the only question raised by the demurrer to the information.

The state contends that the act of March 28, 1889, is the law applicable to the case; its position, as we infer, being that as this act is general in its terms, and covers the whole subject, it repeals by implication the act of 1877. If this were so, it would be decisive of the case adversely to the respondent company, for it is very clear that the act of March, 1889, provides for not a mere statutory license to a foreign railroad corporation to transact business in this state, but a reincorporation, and placing it upon the footing of a domestic corporation within the state. Hence any company accepting its provisions, although also a corporation of another state, would be *here* a corporation "created and organized under the laws of this state." But we shall assume, without deciding, that the act of 1877 is still in force, and also assume, without deciding, that an Iowa railway company, by accepting the benefits of that act, does not become, strictly speaking, a domestic corporation, but merely obtains a statutory license to construct and operate railways in this state, under a grant of all the powers and franchises possessed by domestic railway companies under the laws of this state. This, of course, is the position most favorable to the contention of the respondent. But, even with these concessions, we think that the case comes clearly within the spirit, and also within the language, of Laws 1889, c. 225, giving to the expression, "created and organized under the laws of this state," a liberal, but allowable, construction, in accordance with the sense in which it is apparently used in this connection.

The franchises and privileges which a corporation may exercise within the jurisdiction of any state must in all cases be derived from the laws of that particular state; and this is equally true whether the corporation be admitted to act in the state by a statutory license, or by a grant of a complete charter. Hence the corporate existence of the respondent, considered with reference to its rights and powers in Minnesota, springs wholly from the legislation of this state, which by its own vigor performs the act. Therefore, while, considered as a

legal entity, with the mere right to exist, the respondent may derive its birth and life from the laws of Iowa, yet all its powers, franchises, and privileges, which are the essential and only valuable rights of the corporation, in Minnesota are as entirely and exclusively the creation of the laws of this state as if it was a domestic corporation primarily brought into being by these laws. In this sense the respondent *here* is created under the laws of Minnesota, and comes fairly within the language, as it clearly does within the spirit, of chapter 225. It has frequently been held that it is a reasonable construction of statutes purporting to regulate all corporations created or organized under the laws of a state to hold that such statute applies to foreign corporations reincorporated by the state, or permitted by statutory license to exercise their franchises within its territory. Mor. Priv. Corp. § 998. This statute ought, if possible, as we think it reasonably may, be given this construction; for it is not to be supposed that the legislature intended to exempt corporations primarily created by the laws of another state from the payment of fees exacted from corporations exclusively domestic, when the former obtain and enjoy to the fullest extent all the powers, franchises, and privileges under our laws which are possessed by the latter. No reason for any such discrimination exists, and we ought not to presume that it was intended to make any such distinction, unless conclusively forced to such a result by the language of the act. The act of 1877, and chapter 225 of the Laws of 1889, are to be construed together; and, as the latter requires the payment of these fees as a condition precedent to the filing of the articles of association, and as the former requires an Iowa corporation to comply with the laws of Minnesota as to filing its articles of incorporation, our conclusion is that it was incumbent on respondent to pay these fees before it could file its articles, and that until the articles are duly filed it has no right to exercise corporate franchises in this state. The demurrer to the information is overruled, and judgment ordered for the state, unless the respondent answer within 30 days.

MINNESOTA FARMERS' MUTUAL FIRE INSURANCE ASSOCIATION *vs.*
LUDWIG OLSON.

February 18, 1890.

Fire Insurance—Default on Premium Notes—Suspension of Policy—Action on Notes.—A fire-insurance policy at a gross premium for the term of five years, the insured giving two notes for the premium, contained a clause that, in case of default to pay any note, the insurance should be suspended, and the premium considered as earned, but that, on subsequent full payment, the policy should be revived and in force as to losses happening thereafter. *Held* that, upon a default to pay a premium note, the insurer can recover the amount of it.

Appeal by plaintiff from an order of the district court for Polk county, *Mills, J.*, presiding, overruling its demurrer to the answer.

E. P. Pierce and *Wm. Watts*, for appellant.

H. Steenerson, for respondent.

GILFILLAN, C. J. This is an action on two promissory notes made by defendant to plaintiff, each for the sum of \$29.57, each dated September 22, 1882, one payable December 1, 1882, and the other December 1, 1883. The answer admits the execution of the notes, and alleges, as showing a failure of consideration, that on the day of the date of said notes the defendant made application to plaintiff for insurance upon certain of his property. That thereupon the plaintiff issued its policy, whereby, in consideration of \$59.14, (as agreed to be paid by the two notes,) it insured the property in the sum of \$2,200.55 for a period of five years, to wit, from September 22, 1882, to the 22d September, 1887. That in the policy were several stipulations, which the answer sets forth, but only one of which we need consider, which was as follows: "(13) It is expressly provided and agreed that, when a note (or notes) is given for insurance, it shall be considered a payment, provided such note (or notes) is paid at or before maturity; but, if any part thereof shall remain due and unpaid after maturity, then the insurance made in consideration of such note shall be suspended, and the premium considered as earned, and the association shall not be liable for any loss hap-

pening during the continuance of such default of payment; and no attempt to collect such note, (or notes,) whether by legal process or otherwise, shall be deemed a waiver of any of the conditions of this policy, or have the effect to revive this policy; but, on full payment being made of such note, (or notes,) with interest and all costs that may have accrued, and its acceptance by the secretary, then this policy shall be in force as to losses happening thereafter, unless void or inoperative for some other cause." That default occurred in the payment of the note which matured December 1, 1883, and that by reason thereof the insurance ceased, and was cancelled, and entirely suspended, pursuant to said provisions of the policy, from and after December 1, 1882, and has never since been in force.

In making contracts of insurance, it is competent for the parties to agree on any rate of premium that they choose. These parties might have agreed upon the \$59.14 as the premium for insurance for five years, or for any part of that time; might have agreed that in consideration of said sum, or of the promise to pay it, the insurance should be absolute for a part of the term, and conditional as to the remainder. It is manifest that the defendant got just what he stipulated for as the consideration for his promises to pay. So far as affected by the provision of the policy quoted, he got unconditional insurance from September 22, 1882, to December 1, 1882; and he got also the absolute right to continuance of the insurance for the whole term upon his paying or tendering payment of each note as it fell due; and the absolute right, in case of his default to pay either note at maturity, to at any time during the five years remove the suspension, and revive the insurance, by paying or tendering payment of what should be due from him. The insurer was bound in that respect. The obligation which the insurer thus placed itself under was the consideration for the obligation assumed by defendant. There is nothing in the policy, so far as pleaded in the answer, to show the parties contemplated that the defendant could withdraw from the obligations he assumed, or that it was optional with him to perform those obligations. That part of the clause quoted, "then the insurance made in consideration of such note shall be suspended, and the premium considered as earned," shows the

parties intended that, notwithstanding the suspension, the right of the insurer to the premium should not be affected. The court below seems to have decided the case on the authority of *Yost v. American Ins. Co.*, 39 Mich. 531, and other cases similar to and following it. But this is not at all like that case. In that, the policy, as construed by the court, was not for absolute insurance for five years, but for only one year, with the right to have it kept in force from year to year, in all not exceeding five years, by paying an annual premium thereon, and that it was optional with the insured to pay or not. Here is a gross premium agreed on for insurance for the full term of five years, subject to the conditions of the policy. The same court in *Caufield v. Continental Ins. Co.*, 47 Mich. 447, (11 N. W. Rep. 264,) where the policy was for five years, with a condition that, in case of non-payment of any instalment of premium, it should cease and be void until revived by payment, and the whole amount of instalments unpaid should be considered as earned, held that the company could recover on a premium note. The latter case is like this. The answer in this case did not allege a defence.

Order reversed.

43	23
45	191

HELMER H. LEE vs. WILLIAM H. BANGS, JR.

February 18, 1890.

Sale—Premature Delivery—Waiver.—When goods are ordered, and they are sent before the time specified in the order, the buyer waives the objection that they are prematurely sent by receiving them, and not objecting within a reasonable time.

Same—Inferiority to Sample—Waiver.—On a sale by sample, the buyer acquiesces in the quality of the goods by receiving them, and making no objection.

Plaintiff (doing business under the name of the Sole-Leather Over Manufacturing Co.) brought this action in the district court for Norman county, to recover the price (\$162.25) of 96 pairs of "overs,"

sold and delivered to defendant between June 27 and November 15, 1888. The defendant in his answer alleged that the goods were ordered May 25, 1888, and were to be shipped to him in the fall of 1888, when needed; that at the time of the order it was agreed that in case of a failure of the wheat crop in Norman county, or among his customers in that county, and if in consequence he could not use or sell part of the goods, he might countermand and cancel the order for as many of the goods as he should for such reason be unable to sell; that the plaintiff shipped all the goods June 27th, at least four months earlier than they could be sold, and contrary to the agreement; and on August 16th he notified plaintiff by letter that the crop had been destroyed, and he could not use or sell more than 2 cases or 48 pairs, and that plaintiff must ship the other cases elsewhere, and he would merely hold them subject to plaintiff's order, and this notification was a second time given November 15, 1888; that the crop was in fact a failure, and he was able to sell but 80 pairs, amounting to \$48.04, which sum he has paid plaintiff; that the goods were sold by sample exhibited when the order was given, which sample was warranted to be well made, strong, and durable, and of good material, and he relied solely on the warranty; but the goods were not equal to the sample, and were poorly made of bad material, and he refuses to accept them and is ready to deliver to plaintiff all that he has not sold. At the trial, before *Mills, J.*, the court, on plaintiff's motion ordered judgment in his favor, on the pleadings, for \$119.50. Defendant appeals from an order refusing a new trial.

John M. Martin, for appellant.

A. C. Wilkinson, for respondent.

GILFILLAN, C. J. The order of the court below for judgment on the pleadings in favor of the plaintiff (allowing defendant the part-payment set up by him) was right. The matters set up in the answer constituted no defence. The answer admits that defendant ordered the goods that were sent to him, and the price of them, but alleges that he gave the order in May for the delivery of the goods in the fall, and that it was agreed that upon a certain contingency he might countermand or cancel the order in part; that the goods were sent to him June 27th; and that August 16th he gave plaintiff notice

that he would accept only a specified quantity of the goods. Of course, the right to countermand the order would, of necessity, have to be exercised before the delivery of the goods. By accepting the goods, he would waive his right to countermand, and he also waived his right to object that the goods were prematurely sent him. He ought to have declined to receive the goods at the time, and notified plaintiff of his so declining; instead of which he received the goods, and made to plaintiff no objection till about seven weeks had passed,—certainly an unreasonable time to wait.

The answer that the goods were sold by sample, and that they were not equal to the sample, is still worse, for it does not appear that he ever gave plaintiff any notice of that. One purchasing by sample must, upon the goods being sent him, examine them, and, if they do not come up to the sample, must decline to receive them, and within a reasonable time notify the seller. If he receive them and is silent, he will be deemed to have acquiesced in the quality.

Order affirmed.

W. H. BURNS and another *vs.* W. B. JORDAN and another.

February 18, 1890.

Action on Note — Counterclaim for Breach of Contract.—*Held*, that a general demurrer to the answer in this case, wherein the cause of action, viz., a past-due promissory note, was admitted, but in which was alleged a breach of contract, the only consideration for said note, was properly overruled.

Action in the district court for Ramsey county, on a promissory note for \$274.10. Plaintiffs appeal from an order by *Kelly, J.*, overruling their demurrer to the answer.

William G. White, for appellants.

Thompson & Taylor, for respondents.

COLLINS, J. The answer herein, to which a general demurrer was interposed, admitted the execution and delivery of the note sued

upon, and then, by way of counterclaim, alleged a breach of a contract, between plaintiffs and defendants, for the sale and delivery to the latter of certain lumber, and for which, and upon no other consideration, they executed the note in question. The answer contains several averments as to the manner in which defendants were damaged, and the amount of their loss thereby, concerning which we are not required to express an opinion. The answer sufficiently alleges a breach of the contract, and upon that alone the defendants are entitled to nominal damages. *Cowley v. Davidson*, 10 Minn. 314, (392;) *Wilson v. Clarke*, 20 Minn. 318, (367.) The demurrer was properly overruled.

Order affirmed.

JOHN B. DUFORD *vs.* JAMES B. LEWIS.

February 18, 1890.

Adverse Claims—Attack on Execution Sale—Pleading—Evidence.—

Plaintiff, alleging title in fee, brought an action to determine an adverse claim to certain vacant and unoccupied real property. By his answer defendant denied plaintiff's title, and asserted that he was the owner of said property. Upon the trial plaintiff offered to show the value of the property at a time when the defendant purchased the same at an execution sale, the plaintiff being the judgment debtor and defendant judgment creditor, and that the consideration therefor was inadequate, the object of such testimony being to annul and avoid the sale. *Held*, that in this form of action such testimony was inadmissible.

Other alleged errors in the rulings of the court disposed of.

Appeal by plaintiff from an order of the district court for Ramsey county, refusing a new trial after a trial by *Brill, J.*, and judgment ordered for defendant.

C. D. & Thos. D. O'Brien and Frank Ford, for appellant.

Eller & How, for respondent.

COLLINS, J. Plaintiff, alleging ownership in certain vacant and unoccupied real estate, brought this action to determine an adverse

claim thereto. The defendant in his answer denied plaintiff's ownership, and asserted title to the property in question in himself. On this simple issue the parties proceeded to trial, whereupon it was stipulated that plaintiff was the owner, unless his title had been divested by virtue of an execution sale made under and to satisfy a judgment theretofore entered and docketed in the proper county against said plaintiff. Thereupon the defendant offered and there was received in evidence the judgment-roll; the judgment as entered in the judgment-book; proof of its docketing; the execution and sheriff's return thereon, showing a levy upon the property in question; and a certificate of sale of the same to defendant, more than one year prior to the bringing of this action, duly executed and acknowledged by the sheriff making the sale, to which was attached his affidavit of the fact of the posting and publication of the notices specified and required by Gen. St. 1878, c. 66, § 317, subdiv. 2. These were all in due form of law. The certificate contained all that is required by section 321, c. 66, *supra*, and, with the affidavit, had been properly recorded. The plaintiff objected to the introduction of these various books and documents, principally upon the ground that no foundation had been laid, and he now contends that it was incumbent upon defendant to show, by the record, that a minute was made on the execution by the sheriff when he received it, (section 301, c. 66, *supra*;) that he made a demand on the judgment debtor for payment; that he could not satisfy the execution out of personal property as commanded; and that a copy of the execution, with a memorandum of the levy, was served on the debtor, if he could be found in the county, (section 306, c. 66.) The plaintiff, in rebuttal, offered to show that either and each of the lots sold to satisfy the execution was at the time of a specified value, largely in excess of the sum required to liquidate the judgment, and for which each was sold, but was not permitted to do so. It is his further contention that this was error for which a new trial should be granted.

1. This action was not brought for the avowed purpose of setting aside a sale of real property on execution, on the ground of inadequacy in the price realized, or on the ground of the irregular, fraudulent, or collusive character of the sale, but simply to determine an

adverse claim. The pleadings contained no averments as to the value of the lots when sold, or that the consideration was grossly or otherwise inadequate. It was not alleged that there had been any mistake, surprise, misconduct, irregularity, or fraudulent practices whereby a sale, apparently fair and regular in every particular, ought to be vacated and set aside. Upon a bare assertion of ownership of the land, plaintiff attempted to introduce testimony upon matters which were not in issue, and had in no way been suggested by the pleadings. Again, the object of the testimony was to annul the sale upon which defendant's title rested, and to have it adjudged void, without qualification. In the case of *Tillman v. Jackson*, 1 Minn. 157, (183,) and again in *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281, it was held that the statute (Gen. St. 1878, c. 66, § 319) which provides, in regard to sales on execution, that "where the sale is of real property, and consisting of several known tracts or parcels, they shall be sold separately," is directory merely, and that a sale in gross of separate tracts does not render the sale void. In the last-mentioned case it was further held that, under some circumstances, the owner or party interested in the land might be relieved from a sale of that character; in other words, that such a sale is voidable, not void. This doctrine is applicable to the case at bar. Admitting all that the appellant claims, the sale was not void, although, possibly, for good cause shown, it might be avoided.

2. The objections made to the record and documentary evidence in proof of defendant's title were frivolous. *Tillman v. Jackson*, *supra*; *Bidwell v. Coleman*, 11 Minn. 45, (78;) *Hutchins v. County of Carver*, 16 Minn. 1, (13;) *Barrett v. McKenzie*, 24 Minn. 20; *Knox v. Randall*, Id. 479; *Millis v. Lombard*, 32 Minn. 259, (20 N. W. Rep. 187;) Gen. St. 1878, c. 66, §§ 318, 321-2, *supra*. And see, generally, cases cited in notes to section 339, 2 Freem. Ex'ns.

Order affirmed.

ORLANDO C. MERRIMAN and others vs. Atwood P. Jones and others.

February 18, 1890.

43	39
49	505
43	29
66	482

Mechanic's Lien—Who are Subcontractors.—The respondent corporation entered into a contract with E., a builder, to erect a house upon its land. E. purchased the necessary lumber of J. & Co., dealers in building material. The latter bought nearly all of the lumber used in the house of the appellants, M. B. & Co., also dealers in building material, who delivered it upon the ground where it was used, principally to the builder's foreman. Without knowledge of any claim of appellants, the respondent paid J. & Co. for the lumber. *Held*, that M. B. & Co. were not subcontractors, within the meaning of the provisions of Gen. St. 1878, c. 90, § 2,—now repealed,—and were not entitled to a lien upon the property.

Appeal by plaintiffs from an order of the district court for Hennepin county, refusing a new trial after a trial by *Rea*, J., and a judgment ordered in favor of the Norwegian-Danish Evangelical Lutheran Augsburg Seminary, against whose property the plaintiff sought to establish and enforce a subcontractors lien, for \$651.82.

Borgholthaus & Cameron, for appellants.

Ueland, Shores & Holt, for respondent.

COLLINS, J. The plaintiffs, as material-men, claim a lien upon certain real property belonging to defendant corporation, under the provisions of Gen. St. 1878, c. 90, § 2, repealed by Laws 1889, c. 200, § 19. This action was brought to foreclose said lien, and when plaintiffs rested their case, it was dismissed by the trial court. The testimony shows that one Evans entered into a contract with said defendant to furnish materials, and fully complete for it, upon the real property before mentioned, a dwelling-house, which has been done. Evans purchased the necessary materials of the firm of A. P. Jones & Co., dealers in lumber and building materials. The latter, evidently small dealers, bought the materials in question, (nearly all that was used in the building,) of the appellants, also lumber merchants, with whom they seemed to have dealt generally and upon other occasions. Appellants delivered the materials upon the ground

where used, and principally to Evans's foreman. The respondent was not advised of plaintiffs' claim until after Jones & Co. had been paid for most of said material. The plaintiffs claim that, as subcontractors in the second degree, they are entitled to a lien; but this position cannot be sustained under section 2, before mentioned, which, so far as pertinent, reads as follows: "Every mechanic or other person doing or performing any work towards the erection * * * of any house, * * * or other building, * * * or furnishing any material for the construction * * * of such building, * * * whether such work is performed as journeyman, * * * subcontractor, or otherwise, shall have a lien," etc.

Upon the established principle that, when entering into a contract for the erection of a building, the owner of the land authorizes the contractor, by implication, to charge the property for such materials as may be demanded, and by virtue of the statutes in favor of material-men, Jones & Co. were entitled to a lien for the value of the lumber furnished under their contract with Evans, the builder. This the respondent corporation is presumed to have known, and therefore was in a position to have protected its interests. But the right to a lien accrued to Jones & Co., not as subcontractors, as appellants seem to assume, but as material-men, who are expressly mentioned in, and protected by, the statute. That those who simply furnish materials, taking no part in the work of construction, are not subcontractors in any sense, is quite apparent from the wording of the section heretofore quoted, which provides that all persons performing any work of a specified character, or furnishing any material therefor, whether *such work* is performed as a journeyman, laborer, carman, subcontractor, or otherwise, shall have a lien upon the improved property for the value or contract price of such labor and materials. The design in using the words which we have italicised is obvious. No right of lien is conferred by this part of the statute on the lumber dealer, who simply furnishes materials. It includes and provides for those only who have been connected with the work of construction,—who have in some manner performed labor,—and those, also, who may have furnished materials in connection with their work and labor. The respondent knew that Evans, the builder,

would have to purchase the necessary material for its building, and that the lumber dealer from whom he bought would be entitled, as a material-man, to the statutory security. Against a claim of this character the owners of real property can easily guard; but, should dealers in the various articles which enter into the construction of a building be declared contractors or subcontractors, there would be no method of protection for the owner short of tracing all kinds of materials used back to the manufacturers thereof.

Order affirmed.

JENNIE E. EVANS vs. JAMES G. EVANS.

February 18, 1890.

Action for Divorce a Vinculo after a Limited Divorce.—A decree *a mensa et thoro*, entered under the provisions of Gen. St. 1878, c. 62, §§ 30 *et seq.*, and remaining in force, does not bar an action for a divorce *a vinculo matrimonii*, upon any of the grounds specified by statute.

Appeal by plaintiff from a judgment of the district court for Ramsey county, *Kelly, J.*, presiding, dismissing her action for a divorce from the bonds of matrimony. The defendant did not appear in the district court or in this court.

F. H. Ewing, for appellant.

COLLINS, J. But one question is presented upon this appeal, and that is, does a decree of separation from bed and board forever, made by virtue of the provisions of Gen. St. 1878, c. 62, §§ 30 *et seq.*, and still in force, bar an action for a divorce *a vinculo matrimonii*, upon the statutory ground of habitual drunkenness, (Id. § 6, subdiv. 6,) the cause of action having arisen subsequent to the date of the decree *a mensa et thoro*? The court below found as a fact that the defendant had been guilty of habitual drunkenness for the space of one year immediately preceding the filing of the complaint in the case at bar, but refused the relief demanded in the complaint because of the existence of the decree before mentioned from bed and board, and

which had been obtained by plaintiff some four years prior to the exhibition of her complaint herein. Prior to the passage in 1876 of the act authorizing limited divorces, so called, the only form of divorce proceeding provided by statute was one from the bonds, and by which both parties, without regard to cause or guilt, were equally and absolutely liberated from the obligations of the marriage contract. Such divorces were to be granted upon proof of the existence of either of six distinct and specifically mentioned grounds, one of which is that specified in the complaint herein. The statute in question places these separately stated causes of action upon a common level; it makes no attempt to distinguish or discriminate between them; and, if either be established by proper evidence, an unconditional decree must follow. Good morals might suggest that this is unjust, but we take the law as we find it. The statute under which the plaintiff obtained a decree *a mensa et thoro* was not intended to abridge the statute upon the subject of absolute divorce, nor to restrict its operation. To the female only is granted the right of complaint, and she alone can procure the decree. The corresponding privilege is not given an aggrieved husband. The marriage relation is merely suspended as to certain marital rights and relations, not annulled, and, save as they may be regulated by the terms of the decree, property interests remain undisturbed. In case of the death of either party, the survivor becomes a widow or widower, as the case may be. *Dean v. Richmond*, 5 Pick. 461; *Hokump v. Hagaman*, 86 Md. 511. And when a decree has been duly announced, the court is powerless to revoke it, except upon the joint application of the persons interested and in case of reconciliation. To hold that a divorce from the bonds cannot be adjudged so long as a decree of separation is in force, would lead to the most surprising results. It would confer upon the wife the power to obtain a perpetual decree *a mensa et thoro* from an offending husband, and thereafter to openly give cause for a divorce *a vinculo*, while the husband, no matter how irreproachable his behavior and character might have become in the mean time, remains without remedy or relief. Such a rule would compel an unfortunate wife to ask for an absolute divorce in the first instance, if she regarded a reconciliation

as doubtful, or that, possibly, she might want, at some time, to be wholly freed from her marriage vows, instead of simply seeking temporary relief and separation, in the hope, perhaps, of such conduct in the future as would warrant a revocation of the decree. The act of 1876 does not expressly provide that a decree under it is in lieu of all other relief, and it is manifest that such was not the intention of the legislators.

The judgment is reversed, and the case remanded, with instructions that judgment be entered as demanded in the complaint.

GEORGE W. HALL vs. GEORGE A. PILLSBURY and others.

February 18, 1890.

43	33
78	126
278	433
278	479
43	33
278	278

Grain Warehouseman—Commingled Grain—Rights of Receipt-Holders.—A deposit of grain for storage is a bailment, the title remaining in the depositor, so that he is deemed to be the owner of grain in the warehouse to the amount of his deposit, although the identical grain he deposited has been removed, and other grain, of like kind and quality, substituted in its stead.

Same—Receipt-Holders Tenants in Common.—The holders of receipts for grain so deposited, of the same kind and quality, are tenants in common in the mass of grain of that kind and quality in the warehouse; the interest of each being limited to the amount called for by his receipt.

Same — Warehouseman, when also Tenant in Common.—The warehouseman may also be tenant in common with them in such mass, as where he puts his own grain in the warehouse or purchases from a depositor. His interest in the mass is limited to the excess above what is necessary to meet his outstanding receipts.

Same—Sale by Warehouseman—When Lawful—When a Conversion. He may remove, and dispose of as his own, such excess. If he sell as his own any grain beyond such excess without express consent of the depositors, his sale passes no title, and the owners, the depositors, may follow the grain into the hands of the purchaser, and recover of him for a conversion.

v.43m—8

Appeal by defendants, partners as C. A. Pillsbury & Co., from an order of the district court for Hennepin county, *Hicks, J.*, presiding, overruling their demurrer to the complaint.

Ralph Whelan, for appellants.

B. S. Lewis, for respondent.

GILFILLAN, C. J. Appeal from an order overruling a demurrer to the complaint. From the complaint it appears, in brief, that the firm of G. W. Ehle & Co. operated and conducted, for the storage of grain, a grain warehouse at Stewart, in this state. Fifteen different owners of grain, plaintiff being one of them, deposited at different times with said Ehle & Co., in said warehouse, for storage, different quantities of wheat, the aggregate amount so deposited being 2,647 35-60 bushels, and upon each of such deposits each depositor received from Ehle & Co. the usual warehouse or elevator receipt for the amount so deposited, with, however, this clause, (unusual, we think,) that if, for any reason, it should become necessary to remove such grain, Ehle & Co. reserved the right to deliver the grain from any other warehouse operated by them, etc. As the mere desire on the part of Ehle & Co. to sell the grain so deposited could not be regarded as a reason for removal under this clause, and no reason of necessity for its removal appears, we need not further consider that clause. None of the receipts so issued were redeemed. Ehle & Co., without the knowledge or consent of the receipt-holders, sold and shipped to defendants, and they converted to their own use, so much of the wheat so deposited that there was left in the warehouse, to meet the outstanding receipts, amounting to 2,647 35-60, only 1,144 bushels. This latter quantity was then distributed *pro rata* to the outstanding receipts. All the receipts other than those received by him have been sold to plaintiff, and he brings the action to recover for a conversion of the wheat so sold and shipped to defendants.

It being a general rule of law that a purchaser of personal property gets ordinarily no better title than his vendor has, it will be necessary to consider what was the right or title of Ehle & Co. in or to the wheat; that is, to consider what are the rights, in respect to grain, stored in a general grain warehouse, of the depositor and depositee. This must be determined by the statute regulating such warehouses

and deposits, which is found in Gen. St. 1878, c. 124, §§ 13-20, inclusive. In several cases we have considered some of the features of that statute, but, although in *Leuthold v. Fairchild*, 35 Minn. 99, (27 N. W. Rep. 503, 28 N. W. Rep. 218,) we assumed, rather than fully determined, that a warehouseman who, without the consent of the depositors, disposes of so much of the grain deposited with him that there is not enough left in the warehouse to meet his receipts outstanding, is liable to the holders of the receipts as for a conversion of their property, the question of the respective rights and relations of the depositor and depositee in such cases, and of the rights of a purchaser from the depositee, has never before been squarely brought before us.

The statute was passed for the better protection of depositors in such general grain warehouses. The evils to be cured were those which were supposed to follow the prior rule of law,—the rule of the common law. That rule was that where a deposit was made of grain or other like property, with the expectation that it would be commingled in a common mass of similar kind, deposited by different persons, so that its identity would necessarily be lost, and the undertaking of the depositee was not to redeliver the identical property deposited, but to deliver, in lieu thereof, an equal amount of the same kind of property, the title to the property deposited passed to the depositee. The deposit had the effect of a sale. The statute changes this rule, and provides (Gen. St. 1878, c. 124, § 13) that “such delivery shall in all things be deemed and treated as a bailment, and not as a sale.” Of course, it cannot be understood from this that the depositor’s title to the identical grain remains. The legislature must be taken to have had in view the way in which the business of such warehouses is, and of necessity must be, conducted. They are constantly receiving deposits of grain, and issuing receipts for it, and as constantly taking up outstanding receipts, and removing the amounts of grain called for by them, so that perhaps the same identical grain may not remain in the warehouse a week, though the amount in store is not diminished. The declaration that the delivery shall be deemed and treated as a bailment must be taken as meaning that the depos-

itor shall be deemed to be the owner of, and to have on bailment in the warehouse, the amount of grain that he deposits, although its identity may have been lost by commingling with other, the like kind of grain, and although not a kernel of the identical grain deposited still remains. As fast as grain is removed, and other grain is put into the common mass, the new grain takes the place of that originally deposited, and is appropriated to the contract of bailment, so as to become the property of the depositor. *Nat. Exchange Bank v. Wilder*, 34 Minn. 149, (24 N. W. Rep. 699.)

The grain, of like kind and quality, of different depositors, not being kept separate, but put into a common mass, and each depositor owning the amount called for by his receipt, the different owners owning the entire mass, they own the mass as tenants in common; the interest of each being measured by the amount called for by his receipt. So, if the owner of the warehouse put his own grain into the mass, he becomes a tenant in common of the entire body of the grain with the other owners. Ordinarily, the partition is to be made by the warehouseman, who, when a receipt is presented, and the grain it calls for demanded, and the conditions of the right to a delivery of it complied with, delivers to the holder, as his share of the entire body of grain under that receipt, the amount that it calls for. If the receipt-holder is put to his action of replevin, the sheriff makes the separation. Gen. St. 1878, c. 124, § 16. But, while the interest of the depositor in the mass is measured by the amount he deposits, and mentioned in his receipt, the interest of the warehouseman, by reason of putting his own grain into the mass, is not necessarily measured by what he puts in; for if, from any cause for which he is responsible, as by his taking grain out from the mass, the whole amount is diminished below what is required to fill the outstanding receipts, what he puts in is appropriated at once, so far as may be necessary, to the receipts, and becomes at once the property of the holders. Thus, if there is a shortage thus arising of 200 bushels, and he puts in 400 bushels of his own, his interest in the mass after that is equal to 200 bushels, just the excess above what is required to fill the receipts. That amount, and no more, he has a right to take out and

sell. It is true, it may be the practice—probably is—of warehousemen to take out and dispose of grain without reference to the relation which the amount in warehouse bears to the amount of the outstanding receipts. In other words, it may be their practice to dispose of the depositors' property. When this is done with the consent (such as the statute requires) of the depositors, it is, of course, rightfully done; and in that case a sale by the warehouseman would pass the title. No presumption of consent on the part of the depositor could arise from the existence, however general, of such a practice. Such a practice is made unlawful. Section 18 of the statute provides: "No person receiving or holding grain in store shall sell, or otherwise dispose of, or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the *express authority* of the owner of such grain, and *the return of the receipt* given for the same, except as herein provided."

If the warehouseman be also a dealer in grain, his right to dispose of, as his own, the grain in the warehouse, is limited to that which belongs to him, which he has purchased and put in, or, when deposited by others, which he has purchased from them, and to the excess above what is required to meet his outstanding receipts. The statute clearly enacts that he shall not sell or otherwise dispose of grain on deposit. Its purpose is to provide that the grain shall remain in the warehouse where deposited, to meet the call of the owner. Ehle & Co. were not the owners of, they had no title to, the grain which they sold or assumed to sell to the defendants. It belonged to the holders of the receipts.

Much argument has been expended to show the inconvenience to commerce in grain if in such cases the owner of the grain may, notwithstanding a wrongful sale by the warehouseman, follow the grain into the hands of the purchaser. As touching the matter of convenience, the argument has much force. It might tend greatly to facilitate traffic in grain if we had, in respect to it, such a rule as in England pertains to property sold in markets overt. But there is no such rule in this country. The general rule is that an owner of personal property cannot be deprived of his right to it through the un-

authorized act of another. That rule applies as well to grain or other property on deposit for the purpose of storing as to property in any other situation.

Order affirmed.

43	38
59	69
43	38
102	159
43	38
77	410

SECOND NATIONAL BANK OF ST. PAUL *vs.* EDWARD V. SCHRANCK and
Garnishee.

February 18, 1890.

Assignment in Insolvency—Collateral Attack.—A deed of assignment, complete and regular upon its face, purporting to have been made by virtue of the provisions of Laws 1881, c. 148, (the insolvency act,) although actually unwarranted by the existence of such facts as would alone justify such an assignment, cannot be attacked and assailed in collateral proceedings.

On March 5, 1889, one John Kraus brought suit against defendant Schranck, in a justice's court in St. Paul, and one Geo. W. Walsh was summoned as garnishee. On the same day Schranck made a general assignment to defendant Albert W. Schwabe of all his property not exempt from execution, for the benefit of such of his creditors as should file releases, the assignment reciting the garnishment proceedings, and purporting to be made under the insolvent law. (Laws 1881, c. 148.) On March 11, 1889, Schwabe accepted the trust, and on that day the assignment, with his acceptance, was filed in the office of the clerk of the district court for Ramsey county. On March 21st the inventory was filed, and on March 26th the assignee filed his bond. The suit in justice's court was called on the return-day, March 15th, and was continued by consent to March 22d, and again to March 29th, at ten o'clock A. M., when it was again called, and was dismissed for failure of plaintiff to appear within the hour allowed for that purpose, and for want of jurisdiction of the justice, and judgment was rendered against plaintiff for costs, and the garnishment proceeding was dismissed. On March 26, 1889, the plaintiff re-

covered and docketed a judgment for \$310.85 against Schranek in the district court for Ramsey county, on a promissory note made December 31, 1888, and payable 30 days from date; and after the entry of the judgment, and on the same day, the plaintiff filed an affidavit for garnishment in the action, which was duly served on Schwabe, who disclosed that at the date of service he held in his hands \$640, being the proceeds of the assigned property. The plaintiff thereupon filed a supplemental complaint against the garnishee, alleging the matters above stated, and also alleging that no pleadings, either verbal or written, were ever had in the action of Kraus against Schranek in justice's court; that Schranek was in no way indebted to Kraus; that at the date of the service of the garnishee summons in that action upon Walsh, the garnishee, the latter had no property or effects of Schranek in his possession or control, nor has he since had any, but on the contrary Schranek was indebted to Walsh in the sum of \$27.50; that the action of Kraus against Schranek was fictitious, and was brought, and the garnishment made, solely in order to enable Schranek to take advantage of the insolvent law, and with the fraudulent purpose of evading the true object and meaning of that law. The assignee, Schwabe, answered the supplemental complaint, and the action was tried before Kerr, J. The plaintiff introduced evidence tending to prove its allegations respecting the proceedings in the action of Kraus against Schranek and the character and purpose of that action, and the court directed a verdict in its favor against Schwabe, as garnishee, for the amount of its judgment with interest. On motion of Schwabe a new trial was granted, from which order the plaintiff appeals.

Berryhill & Davison, for appellant.

O. E. Holman, for respondent.

COLLINS, J. In all of the cases heretofore considered by this court, in which the point might have been raised, it has been assumed that a deed of assignment, regular upon its face, purporting to have been made by virtue of the provisions of chapter 148, Laws 1881, but actually unwarranted by the existence of the facts which alone would justify such an assignment, could be attacked and assailed collaterally; for instance, by proceedings in garnishment against the person who has

qualified as assignee, as was attempted in this case. The correctness of this practice has never been questioned, and, as a consequence, it has not been decided, although it was held in *Lord v. Meachem*, 32 Minn. 66, (19 N. W. Rep. 346,) the assignment being, in fact, valid, that the assignee could not be garnished, for several reasons, the insuperable one being that the assigned property was *in custodia legis*. But we are clearly of the opinion, in view of the character of the proceedings in insolvency, that in cases where the deed itself is regular, and, upon its face, complete, no distinction can be made, and that this method of adjudicating upon the validity of the assignment, by collateral attack, is irregular, and should no longer prevail. When the assignment is perfected, and to some extent, at least, prior thereto, its entire subject-matter—all that is involved, including the assigned estate—passes under the jurisdiction of the district court, *ipso facto*. Immediately, and without any further act, the assigned property is in the custody of the law. Supervisory authority and control are conferred upon the court, and the insolvent himself yields to its jurisdiction when he files the deed of assignment; and this extends from that time clear through all of the steps which may prove essential, including the final decree. The proceeding, from beginning to end, requires the exercise of judicial power, and is judicial in its nature. *Clark v. Stanton*, 24 Minn. 232; *Kingman v. Barton*, Id. 295; *In re Mann*, 32 Minn. 60, (19 N. W. Rep. 347.) As the assignment here was apparently valid and well founded in fact, and the proceedings are judicial in their character, it cannot be attacked and assailed collaterally, in another judicial proceeding. In placing our decision upon this ground, we do not wish to be understood as intimating that the court below was in error in its reasons for granting a new trial.

The case is remanded, with direction to enter judgment for defendant.

PATRICK FOX vs. SMITH ELLISON.

February 18, 1890.

Municipal Court—Legal and Equitable Actions.—Complaint considered, and *held* not to be upon an equitable cause of action, so as to be beyond the jurisdiction of the municipal court of Stillwater.

Appeal by plaintiff from an order of the municipal court of Stillwater, sustaining a demurrer to the complaint, in which plaintiff asked judgment for \$97.90.

C. P. Gregory, for appellant.

H. N. Setzer, for respondent.

GILFILLAN, C. J. This action was commenced in the municipal court of Stillwater, and comes here on appeal from an order sustaining a demurrer to the complaint, on the ground that that court had not jurisdiction of the action. That court has no jurisdiction of a purely equitable cause of action, and cannot grant equitable relief. The demurrer was interposed and sustained on the theory that such is the character of the cause of action set forth in this complaint. The complaint alleges that Daniel P. and Garret G. Fox were the owners of logs bearing a certain log-mark; that the log-mark was of record in the office of the surveyor general of logs, in the name of the defendant, as security for money loaned and supplies furnished, it being agreed that, when paid, defendant should transfer the log-mark, and all logs bearing it, to the Foxes; that he has been paid in full, and when they demanded it he refused to so transfer. It then states how many logs he received, and did not pay nor account for, and the value thereof, and that he received such value, and promised to pay the same to said Foxes, but on demand refused to do so, and that the Foxes have assigned the claim to plaintiff. The complaint asks judgment for the value of the logs.

There is nothing in this statement of a cause of action to prevent a justice of the peace, or the municipal court, entertaining it and granting the relief sought. It is true, some of the facts suggest an equitable cause of action, to wit, for specific performance of the

agreement to transfer the log-mark, but the action is not brought upon it; that relief is not sought. The theory of the complaint is that, the logs belonging to the Foxes, the defendant, after the debt was paid, was accountable to them for the value, or for the proceeds of sales of them, as for money had and received. The fact that the log-mark was recorded in defendant's name is not inconsistent with the Foxes owning the logs, for the record of a log-mark, in the name of one person, is only *prima facie* evidence that logs bearing that mark are the property of such person. Gen. St. 1878, § 27, c. 32. Order reversed.

CHRISTIAN RAHMAN *vs.* MINNESOTA & NORTHWESTERN RAILROAD COMPANY.

February 18, 1890.

Master and Servant—Contributory Negligence.—The testimony in this case examined and considered, upon defendant's contention that it clearly appeared therefrom that plaintiff contributed to the negligence which is said to have caused the injury received by him while in defendant's employ. *Held*, that said testimony does not show plaintiff to have been guilty of contributory negligence.

Appeal by defendant from a judgment of the district court for Ramsey county, where the action was tried before *Wilkin, J.*, a verdict of \$2,406.25 rendered for plaintiff, and a motion for a new trial denied.

Lusk & Bunn, for appellant.

H. C. McCartey, for respondent.

COLLINS, J. Action to recover damages for an injury alleged to have been caused by defendant's negligence. Plaintiff obtained a verdict, and on the presentation of the appeal, which was from a judgment entered after an order refusing a new trial, the only point relied upon by the appellant was that from the testimony it clearly appeared that plaintiff was guilty of contributory negligence at the time the injury was inflicted. Plaintiff was a "wiper" in the defendant's employ, at one of its round-houses, and had been so employed

about three months. Previous to this he was inexperienced in the business of railroading. As a wiper it was his duty to wipe off and clean locomotives as they arrived and departed, and to go with the dispatcher, or "hostler," as he is generally called, when the latter, acting as an engineer, ran the locomotive to and from the round-house to the main track, at which point the regular engineer customarily assumed or surrendered control. When with the dispatcher upon the locomotive, it was plaintiff's duty to aid in putting in water and fuel, to open and close switches, and, occasionally, to couple the locomotive on to cars which might have to be moved a short distance. No instructions had been given plaintiff in the art of coupling cars, nor had he been advised as to any rules which required the use of signals to or from the dispatcher, by the use of a bell or otherwise, except that he had observed that it was the usual practice for the acting engineer to receive a signal from the person who was to make the coupling, when ready to do so, and that on one occasion he had been told by the dispatcher that they dare not move the engine before ringing the bell. On the day of the accident plaintiff was with this same dispatcher upon an engine which had to be placed temporarily upon a side track. On this track stood some cars which the locomotive would have to move in order to make room for itself. It had stopped some 10 feet from these cars; the plaintiff was on the ground, and, under orders from the dispatcher, as he testified, stepped to the end of the cars, that he might couple them on to the locomotive. Finding the pin fast in the draw-head upon the car, he stepped to the tender of the locomotive, obtained another pin, returned to the car, and, while attempting to drive the fastened pin out of the draw-head, was struck by the locomotive, which, without any warning whatsoever, had been moved back upon him by the dispatcher. That the latter was negligent is conceded, but, as before stated, the defendant insists that the plaintiff contributed to this negligence, and hence cannot recover. Although there was testimony tending to show that plaintiff, when struck, stood with his back to the locomotive in an unsafe and improper position when actually coupling cars, it must be borne in mind that the dangerous position was not assumed while anticipating, or having reason to expect, the approach of the locomotive,

but for the purpose of removing the pin from the draw-head of the car. Directed by the dispatcher, as plaintiff testified, to make the coupling, plaintiff had gone to the end of a car to prepare it for the connection, leaving the locomotive motionless upon the track, 10 feet distant. Although an inexperienced man, (which seems to have been known to the dispatcher and yard-foreman,) he had not been instructed in any way as to coupling cars, or as to the rules, if there were any, which regulated moving locomotives about to connect with stationary cars. He had observed, however, that, under circumstances like these, it was the prevailing custom, which was not denied by the appellant, for the acting engineer to await a signal from the person upon whom devolved the duty of coupling, before putting his engine in motion. He had also been informed on one occasion, by this same dispatcher, that they dare not move the engine before sounding the bell. The circumstances under which this remark was made might be of importance in determining just what was intended by it, and what plaintiff should have understood, but this was a matter for the consideration of the jury. When the plaintiff went to the end of the car and endeavored to remove the pin, he was engaged in the performance of a duty, was rightfully there, and certainly his position would have been a safe one, had his signal been waited for, or, perhaps, if the bell had been rung, before putting on steam. The law imposed upon him the exercise of ordinary care and prudence, and in considering what this is, under a given state of facts, regard must be had for the danger to be apprehended, the reasonable probability of incurring it, as well as the natural presumption that other persons will discharge their duty, and act with due care. In this case it was for the jury to say whether, under all of the circumstances, the plaintiff had the right to rely upon his knowledge of the practice in regard to signals from the person engaged in coupling, and upon what had been stated to him about sounding the bell before starting the engine.

Judgment affirmed.

CHARLES C. BENNETT, Administrator, vs. SYNDICATE INSURANCE COMPANY and others.

February 24, 1890.

Struck Jury—Waiver of Irregularities in Order.—A trial of this action terminated in a disagreement and discharge of the jury. On plaintiff's motion for a retrial at the same term, the court ordered, for reasons which we must presume to have been adequate, although not stated in the order, that the cause stand continued, unless the plaintiff should consent to try it to a "struck jury." Plaintiff consented in writing, participated in the selection of such a jury, and tried his case. *Held*, that he could not question the regularity of the order, after verdict.

Same—Waiver of Written Demand.—No formal demand was made by either party, as contemplated by Gen. St. 1878, c. 71, § 15, for a struck jury, but this was well known by the plaintiff when he accepted the conditions of the order, and took part in the selection of the jurors. *Held*, that he waived the irregularity mentioned.

Impeachment of Witness—Testimony at Former Trial.—A witness for the plaintiff was charged, when testifying, with having materially changed and added to his testimony as given upon the previous trial. This he denied, whereupon the court stenographer who took the testimony produced and read his notes in full. The witness recognized the same as correct. All of the testimony was then offered by the defendants, and received in evidence, under objection, in support of the claim that the witness had changed and added to his testimony upon a material point. *Held*, that the court did not err in ruling the same admissible.

Other alleged errors in the rulings of the court when taking the testimony, and errors said to have occurred in its charge to the jury, considered and disposed of.

Plaintiff, as administrator of Gustave Brown, deceased, brought this action in the district court for Hennepin county, to recover \$5,000 damages for the alleged negligence of the defendants causing the death of his intestate. The St. Anthony Elevator had been destroyed by fire, and Brown, being engaged with others in clearing away the debris, was killed by the falling of a wall, under circumstances detailed in the opinion upon a former appeal. See 89 Minn.

254. After the decision of that appeal the case was again tried, and the jury disagreed. The order (mentioned in the opinion) granting plaintiff's motion for a retrial at the same term, on condition of his consenting to trial by a struck jury, was thereupon made by *Hicks, J.*, and the cause was thereafter tried before *Hooker, J.*, pursuant to such order, and defendants had a verdict. The plaintiff appeals from an order refusing a new trial. At the trial, *Geo. B. Bradbury*, one of the jurors, was challenged for cause by plaintiff, and the challenge was denied, no exception being taken. No objection was made to the struck jury or to any other juror. The motion for a new trial (in addition to the grounds that the verdict was against evidence, and for errors of law duly excepted to) was made on the ground that the court erred in overruling the challenge to *Bradbury*; that the jury was not a struck jury within the meaning of the law, because not demanded in writing and not paid for by defendants, but from the county treasury, and was not a jury known to the law; that the order for a continuance unless plaintiff consented to a struck jury was in excess of the discretionary power of the court, and it was irregular to order a struck jury when defendants were not entitled to it, and had made no written demand; and that the struck jury was irregularly selected, in that the sheriff made up the list of 40 names wholly from the city of Minneapolis, and from the friends, associates and neighbors of defendants, and not from the entire body of the county of Hennepin, and did not select such persons as were most indifferent between the parties and best qualified to try the issue.

Merrick & Merrick, for appellant.

Hart & Brewer, for respondents.

COLLINS, J. The plaintiff, as administrator, brought this action to recover damages from defendants for having caused, through negligence, the death of his intestate. The circumstances under which the latter lost his life are fully narrated in the opinion on a former appeal, (39 Minn. 254; 39 N. W. Rep. 488,) whereby an order refusing plaintiff a new trial was reversed. The cause was again brought on in district court at the December, 1888, term, and on the 24th of that month, after a trial which consumed several days, the jurors

disagreed, and were discharged. At a special term held February 23d following, plaintiff's counsel earnestly urged, by affidavits and otherwise, that an immediate retrial be had. It does not appear that this was very seriously opposed by defendants' counsel, but the court declined, ordering that, unless the plaintiff consented to a "struck jury," the case should stand continued until the next term, which commenced about April 1st. The plaintiff's counsel immediately served notice upon defendants' attorneys and upon the sheriff of their consent, appeared and took part in the proceedings whereby such a jury was selected, and tried their case in March. A verdict was had for the defendants, and this appeal is from an order denying a new trial. There are several assignments of error, and such as, in our judgment, need comment we will now proceed to consider.

1. It is urged that the court below erred in refusing another trial to the plaintiff at the December term and by the regular panel of jurors. The order refusing a retrial at the December term, unless plaintiff should agree to a struck jury, does not disclose the reasons or circumstances which actuated the court when making the same; but it is safe to presume that the reasons were well founded, and the circumstances sufficient to justify the action. From other parts of the record it is apparent that this way of disposing of the case at the pending term came to the mind of the court during the arguments, and by it was first put forth as a mere suggestion to the parties. The idea was adopted by the counsel for the defendants, and there is nothing whatever in the record of the proceedings at that time, to indicate that plaintiff's attorneys objected to the order as made. Indeed, they immediately signified their acquiescence by serving written notice upon the opposing counsel and upon the sheriff, at the same time requesting the latter to take steps to impanel the requisite number of jurors. This he did, the plaintiff's attorneys participated in the proceedings; a jury was obtained, and the case tried, before the appellant remonstrated or excepted in any visible manner. Although it is a fact that no formal request was made for a struck jury by either party, and the proceeding seems to have been irregular, the plaintiff, so far as the record shows, failed to object thereto. He accepted the condition imposed, proceeded to trial, and has waived

the irregularity, as he had a right to do if he so chose. By an affidavit, made subsequent to the rendition of an unfavorable verdict, he now attempts to prove that he protested against the order. To permit this, or to hold that it would be of consequence if clearly established, under the circumstances, would be to put the plaintiff in a position where, if the verdict had been satisfactory, he could abide by it; but, as it is against him, he may avoid it. The absurdity of such practice is apparent.

2. The assignment of error in reference to the jurors Bradbury and Elwell is not predicated upon any ruling or exception found in the settled case. Nothing further need be said about it.

3. During the trial several exceptions were taken by plaintiff's counsel to the rulings of the court upon the admission or exclusion of testimony, and these rulings are assigned as error. Such as are deemed worthy of mention we will now briefly discuss. Upon cross-examination of one of plaintiff's witnesses, Taylor, his testimony given upon the former trial was called for by respondents, and read to the jury, appellant objecting, by the stenographer who took the same. It was claimed by respondents that the witness had at the pending trial varied his testimony, and had given important evidence in appellant's behalf relative to a matter concerning which he had, on the former occasion, disavowed all knowledge. He was specially interrogated upon this point, but insisted that he had not changed or added to the testimony previously given. The witness admitted that the stenographer's version was correct, as read in the presence of the jury. It is evident that, if his testimony then being received differed materially from that which he had given at another trial, there was no error in the ruling; the fact was admissible for the purpose of discrediting the witness. That he had altered it, or added to it, in some important and material matter, could best be shown by producing it all and as an entirety. If, upon the other hand, there had been no material change in the evidence, no harm was done, and the appellant was not prejudiced by its admission.

4. The witness Garcelon was the foreman in charge of the day crew, in which the deceased was employed when killed. Under plaintiff's objection, he was permitted to state, in a brief and general way,

what instructions he had received from the defendants, as to exercising proper care while the men were engaged in removing the overflow of wheat from the walls. Immediately following this, he stated at length what was done to escape disaster, the vigilance used, and the precautions taken to avoid any exposure of the workmen to such unnecessary and unreasonable risks as were known, or such as the defendants ought to have known by the exercise of due diligence. It is manifest that the inquiry as to what instructions were given him was preliminary only, and in the direction of, or leading up to, the material evidence as to just what diligence was, in fact, used to ascertain that the place where the deceased and others were set at work was safe for the purpose. The statements of the witness as to what instructions he had received from the defendants were not offered, nor were they in the least relied upon, as evidence that any degree of care or diligence had actually been used; for they were immediately followed by the pertinent and material testimony from the same witness, as to what he did to assure the safety of the laborers. He gave evidence as to his acts in that direction, to establish the defendants' position that they did exercise reasonable diligence—that is, diligence proportionate to the occasion—to see that the place of employment was safe for the purpose. There was, under this condition of the testimony, no error in the ruling.

5. We do not deem it incumbent upon us to follow the counsel for the appellant through the many assignments of error made by them in respect to the charge of the court to the jury, or in regard to its refusal to instruct the jury in the language found in the six elaborate requests prepared and presented for that purpose. It is quite probable that the principles of law applicable to the facts involved herein might have been stated more concisely, but the charge is not open to the criticism of counsel that it was, as a whole, inaccurate, or that it tended to mislead and confuse, instead of aiding and enlightening, the jury. In it we find all of the propositions contended for by plaintiff upon the trial, which have place in an action of this character, stated clearly and intelligently. The jurors must have understood the law pertinent to the situation, and we see no ground for a reversal in anything the court said or omitted to say in its charge.

Finally, the issues in this case were well defined and clearly presented to the jury. It is possible that, upon all material points, the preponderance of the evidence was with the appellant, and he should have had a verdict. This is not enough, however, to warrant a reversal of the order refusing a new trial, and it must be affirmed.

OTTO STREISSGUTH and another *vs.* NATIONAL GERMAN-AMERICAN BANK.

February 24, 1890.

Bank—Collections—Liability for Correspondent.—A bank with which a customer has left for collection his draft upon a party residing at a distant point is liable for the failure and default of a correspondent to whom it forwarded the draft for collection.

Appeal by defendant from a judgment of the district court for Ramsey county, where the action was tried by *Brill, J.*, who found the facts substantially as follows: During more than five years next before suit brought the defendant (a national bank) was accustomed to receive from its customers (including plaintiffs) for collection, and to collect for them, all drafts and checks left with it for collection, and, in collecting from persons living at remote places, to send them to its correspondents at or near such places. On November 13, 1888, plaintiffs deposited with defendant for collection their draft for \$137.52, on a mercantile firm doing business at Lake Crystal, Blue Earth county, in this state, about 100 miles from St. Paul. The defendant, on November 14th, sent the draft in due course of business, to its correspondent, a bank of good standing and credit at Lake Crystal, to which it was paid by the drawees on November 24th, and which became insolvent on November 28th, and has never paid over the amount collected. The draft was received by defendant in the usual course of business and without any express agreement. The defendant exercised ordinary care and prudence in selecting such bank as its agent to collect the draft. In the usual course of business a small charge for collection (called exchange) was made,—in

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this case 52 cents, such exchange being retained by defendant's correspondent, and the defendant would pay plaintiffs the amounts collected from their drafts, less such exchange, plaintiffs not knowing who received the exchange. As conclusions of law the court held that defendant was liable for its correspondent's default, and ordered judgment for the amount of the draft with interest from November 30, 1888.

John B. & W. H. Sanborn, for appellant.

Young & Lightner, for respondents.

COLLINS, J. The single question presented by this appeal is whether a bank with which a customer has left for collection his draft upon a party residing at some distant point can be held responsible for the failure and default of a correspondent to whom the bank has forwarded the draft for collection. It must be admitted that there is apparently a great conflict of precedents upon this precise question, and it is possible that, as contended by the appellant, the weight of the authorities, numerically speaking, is with the proposition that when, under such circumstances, a bank has exercised ordinary care and prudence in the selection of a correspondent to whom it transmits a draft, bill, or note for collection, and remittance of the proceeds, its liability terminates, because, as it is necessary and customary, and in the usual course of business, for banks to collect through correspondents, of which necessity, custom, and course of business the owners and holders of paper have full notice and knowledge, it must be held that they have assented to and authorized the work of collection through others. The question involves a rule of general application and of commercial law. As it concerns trade between different and distant places, and, in the absence of a statute or contract or usage which has obtained the force of law, is not to be determined according to the views or interests of any particular persons, classes, or localities, it should be decided according to those principles which govern and best promote the general welfare of the entire commercial community, and in accordance with the general principles which apply to all who contract to perform a service. When the appellant received the draft for collection, it entered into a contract, by implication, to perform such duties as were necessary for the protection of its customer.

It agreed to collect the paper itself, not to procure the services of another to make the collection. The plaintiffs had no voice in the selection of appellant's agent or correspondent, and it is difficult to see why banks and banking-houses should be excepted from the operation of a cardinal and well-established principle of law, that every person is liable for the acts of such agents as may be appointed or designated by him to transact such business as he has undertaken to perform for others. The appellant, having undertaken the collection of the paper, stands in the attitude of an independent contractor, who, having unrestrained liberty so to do, has designated a subagent, and is therefore answerable for his neglect, failure, or default. It is true that in the adjudicated cases cited by the appellant strong arguments are found, and cogent reasons stated, in support of its position; but we are of the opinion that the conclusion we have reached is the sounder one upon principle. It is also sustained by the supreme court of the United States, and the courts of last resort of several of the states, including that of the great commercial centre, New York. It is also the rule in England. *Exchange Nat. Bank v. Third Nat. Bank*, 119 U. S. 276, (5 Sup. Ct. Rep. 141;) *Allen v. Merchants' Nat. Bank*, 22 Wend. 215; *Ayrault v. Pacific Bank*, 47 N. Y. 570; *Simpson v. Waldbury*, 63 Mich. 439, (30 N. W. Rep. 199;) *Titus v. Mechanics' Nat. Bank*, 35 N. J. Law, 588; *Reeves v. State Bank*, 8 Ohio St. 465; *Tyson v. State Bank*, 6 Blackf. 225; *Am. Express Co. v. Haire*, 21 Ind. 4; *Mackersy v. Ramsays*, 9 Clark & F. 818; *Van Wart v. Woolley*, 3 Barn. & C. 439.

Judgment affirmed.

RICHARD W. JOHNSON, Administrator, *vs.* ST. PAUL, MINNEAPOLIS &
MANITOBA RAILWAY COMPANY.

February 27, 1890.

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Master and Servant—Signal Posts near Track—Liability of Company.

It is the duty of a railway company to place its structures and signal-posts at a reasonably safe distance from its tracks so as not to be dangerous to brakemen and other operatives upon the trains, or to warn them of such dangers, if they exist. The employees are not presumed to assume the risk of such perils, in the absence of notice.

Same—Contributory Negligence of Servant.—Plaintiff's intestate, who had been employed for about two weeks in its yard, where were numerous tracks and constantly moving trains, was killed by coming in contact with a signal-post while ascending the outside ladder of a box-car. The post was four feet from the rail. There was evidence tending to show that the post was too near the cars to be practically safe for operatives, unless aware of the danger. *Held* that, upon the evidence, the question of defendant's negligence in locating and maintaining the post was for the jury; and also that the court is not warranted in holding, as a matter of law, that the deceased was guilty of contributory negligence in not observing that the post was so near the cars as to be dangerous, and in not appreciating and avoiding the danger. But the evidence is *held* not so clearly to preponderate in favor of the verdict as to warrant a reversal of the order of the trial court granting a new trial.

Appeal by plaintiff from an order of the district court for Ramsey county, *Kelly, J.*, presiding, granting a new trial after a verdict of \$5,000 in his favor in an action for the death of his intestate caused by alleged negligence of defendant.

Richard K. Boney, for appellant.

M. D. Grover and *Flandrau, Squires & Cutcheon*, for respondent.

VANDERBURGH, J. The general propositions of law applicable to this case are that a railroad company is bound to place signal-posts or other structures used in connection with its road, or the operation thereof, at a reasonably safe distance from the track, so as not to be dangerous to brakemen or other employees who work on its trains; but if, for any reason, it is found necessary to erect or place such

structures so close as to be hazardous to its employes, it is in such case its duty to warn them of the danger, so that they may understand the nature of the risks to which they are to be subjected, and may govern themselves accordingly; and, in the absence of such notice, they have a right to assume that the company has performed its duty in this respect. They are presumed to have knowledge of the ordinary perils of the employment, but not of special or extra hazards, such as may arise from the unsafe proximity of signal-posts, bridges, etc., of the presence of which they have not been informed, or of the dangers incident to which they have not learned. If, in case of an accident to an employe, the master's failure to perform his duty in these respects is clearly established,—that is to say, if such structures are obviously so near the track as to be dangerous; or if, on the other hand, they are shown to be so far removed as to make it apparent that employes or operatives can discharge their duties in the exercise of ordinary prudence, with reasonable safety; or if it is clear that the plaintiff has negligently exposed himself to danger, or knew, or in the exercise of ordinary prudence ought to have known, and avoided it,—in all such cases the question of negligence or the exercise of reasonable care, on the part of either or both parties, will be for the court; otherwise it will be for the jury. These propositions are so generally accepted that they hardly need to be referred to. The chief difficulty lies in their application to the facts of particular cases.

In the case at bar, plaintiff's intestate was employed as a switchman in defendant's yard at St. Paul, near the Union depot, where there is a great number of tracks, over which numerous trains from different lines enter and depart from the depot. The defendant has constructed, and for several years has operated, at that place, a system of interlocking switches, worked in connection with semaphores or signal-posts, of which there are 30 in its yard. The deceased, while discharging his duty, was in the act of climbing up or down the side ladder of a box-car in a moving train, when it was drawn past one of these signal-posts, which struck his body, and he was knocked down and killed. The post in question was 8 inches square, and situated between the tracks, which were distant from each other 14 feet

from centre to centre, and was distant 4 feet each way from the rails. Allowing for the space occupied by the roof and ladder, the witnesses are not agreed as to the exact distance between the car and the post; but there is evidence in the case tending to prove that it was too close to moving trains to be safe for employees, unless they exercised care to avoid it while the trains were passing by it. There is also evidence tending to prove with reasonable certainty that it was necessary to maintain a signal-post of some kind at or near that point, for the protection of moving trains, and in order to conduct the business safely and successfully. The location, size, proximity of the post to the cars, the character of the duties of the deceased, the nature and extent of defendant's business, are also shown by the evidence; and, from all the circumstances disclosed by it, we think the question whether the defendant used reasonable care and diligence, within the rule stated, as respects the safety of its employees, was for the jury. There is no evidence that he was warned or notified of the peculiar hazard to which he might be exposed from the situation of the signal-post. But he had been employed there for two weeks or more, and had occasion to pass by it many times a day, and it was an object so prominent and so essential in the service in which he was engaged that his attention must have been frequently drawn to it. We are not prepared to say, however, that this is conclusive evidence that he was negligent, or that he knew, or should have known if he used ordinary prudence, the danger of such an accident. His labors were onerous, his duties were necessarily pressing and absorbing, while engaged in his employment; and, while he must have known of the existence and location of this post, he may not have known from mere observation, or unless his attention had in some way been specially called to it, (situated as it was, in the centre, between the tracks,) that it was near enough to the cars to be dangerous, but might be misled unless he had made actual measurement or calculation. It may be observed, also, that his attention would more likely be called to the movable signal extending out from the post than to the post itself. In the absence of anything to excite special apprehension of danger from such cause, he might also assume that the defendant had exercised due care in the location of the post. *Whalen v. Ill. &*

St. Louis R. Co., 16 Ill. App. 320, and cases. We do not, therefore, consider that the fact that he had worked in the yard for the time mentioned, notwithstanding he was bound to exercise care and diligence commensurate with the generally dangerous character of his business, was, as matter of law, conclusive that he was negligent, nor do we undertake to say that he was not. But here was a variety of facts and circumstances to be considered and weighed, and the case was one which, in our judgment, was properly submitted to the jury.

The trial court granted the motion for a new trial on the ground that the verdict was not justified by the evidence. Upon the state of the record this will not be held to be an abuse of its discretion, and, in conformity with the well-established practice of this court in such cases, the order will not therefore be reversed, though the trial court went further, and was also of the opinion that the deceased was shown to be guilty of contributory negligence.

Order affirmed.

GILFILLAN, C. J. I concur in the result, but dissent from the proposition that the question of the negligence of the deceased, or his assumption of the risks of the business, was for the jury.

E. G. BUTTS vs. NORTHWESTERN PRINTING & PUBLISHING COMPANY and another.

February 27, 1890.

Chattel Mortgage—Description of Property—Parol Evidence.—A chattel mortgage specifically described sundry printer's implements, materials, presses, etc., in a printing-office, and also in addition included, in general terms, "all furniture and fixtures" used therein. In an action of replevin by the mortgagee to recover the mortgaged property, the court allowed him to recover, in addition to the goods specifically described, such articles of furniture and fixtures as in its judgment, upon the evidence, might properly be so denominated in such an establishment, and disallowed his claim to articles falling within neither class. In the ab-

sence of the evidence, which is not returned, this court finds no error in the construction of the description in the mortgage as applied to the subject-matter.

Appeal by plaintiff from a judgment of the district court for Hennepin county, where the action was tried by *Lockren, J.*, a jury being waived.

Thomas Canty, for appellant.

Brooks & Hendrix, for respondent Kelly.

Charles H. Howard, for respondent corporation.

VANDEBURGH, J. The plaintiff, claiming title as mortgagee of certain personal property described in the complaint, brought this action to recover the possession thereof from the defendants. The case went to trial upon issue joined, and the court found the plaintiff entitled to recover a certain portion of the property, described in the judgment, amounting in value to the sum of \$2,034, and that sundry items, the title to which is in dispute, were not included in the plaintiff's mortgage. Judgment for the recovery of the first-described property was ordered for the plaintiff, and in favor of the defendant Kelly for the return of the property not found to be covered by the plaintiff's mortgage, (a list of which also appears in the judgment,) and judgment generally against the defendant Printing Company. The plaintiff appeals from the judgment. None of the evidence is returned, and the case is here upon the pleadings, findings of the court, and the judgment. In determining whether the court erred in excluding the property ordered to be returned to the defendant Kelly, we are confined to the description in the plaintiff's mortgage, and our interpretation of its language and terms.

A copy of the mortgage is not returned, but the court finds the description therein to be as follows, viz.: "One country Potter printing-press; one eight quarto job printing-press; one four quarto job printing-press; one number two Peerless paper cutter; one four-horse power steam-engine, together with all the belts and fixtures connected therewith, and used in operating the above-named presses; also six composing stones; about 2,000 pounds of type, (both newspaper type and job type;) and all furniture and fixtures now owned and used by said first party in the prosecution of their printing business, and

now located in the third and fourth stories (known as room 21) in the building number 319 Nicollet avenue, known as the 'Wood Block;' all of said property being now in the possession of said first party, in the city of Minneapolis, county of Hennepin, and state aforesaid." The court further finds that, when the mortgage was made, "all the goods, chattels, personal property, and fixtures" mentioned in the plaintiff's complaint, and being the property in controversy, were owned by the defendant company, and in use in said rooms in its said business, except the pair of scales mentioned and one case of wooden furniture, and except that all the type of all kinds, both newspaper and job type, was less than 2,000 pounds; and that since said mortgage was so made said corporation has bought and added thereto new and other type, and has so mixed and confused the same with the type that was there at the date of said mortgage that neither can be distinguished or separated from the other. Plaintiff's mortgage was dated and filed in February, 1888, and on the 28th day of November, 1888, the possession still remaining unchanged, the defendant company executed the mortgage, also described in the pleadings, to the defendant Kelly, from whose possession the property was taken in this action.

A comparison of the description of the articles ordered returned, because not covered by plaintiff's mortgage, with the description in the latter, is not sufficient of itself to authorize us to hold that the court erred in its construction of the description in the mortgage, in the absence of any explanatory evidence. Numerous items, it is apparent, were rightly excluded; as, for example, there are three printing-presses described in the mortgage, and identified. The court, therefore, properly excluded a fourth press, of a different description; and so of "the card-cutter," "lead-cutter," "mitering-machine," etc. The general terms "furniture and fixtures" were obviously intended to cover articles other than the items of printing materials, tools, or the implements of the trade, some of which are not specifically mentioned in the mortgage, but are claimed by the plaintiff. But the court evidently included, in the list of goods which plaintiff is allowed, property which presumably may be classed as furniture and fixtures in a printing-office, such as cabinets, cases, dry-racks, news-stands, belts,

pulleys, etc., in addition to ordinary furniture, such as chairs, desk, clock, etc.; and we are not prepared to say, in the absence of the evidence, that the court ought to have included more. As respects articles used by printers of the peculiar character and nature of which the court could not take notice, and would need to be informed and to have explained by those having peculiar knowledge on the subject, the burden rested on the plaintiff to show to which class, if either, they belonged, and that they were therefore included in the mortgage, though not specially named. For instance, the mortgage calls for "six composing stones." The court cannot, without evidence, say that "imposing stones" mean the same thing, nor that they are to be classed as furniture; and so of the other articles about which there may be doubt.

No error being apparent in the record, the judgment must be affirmed as to both defendants.

D. H. EVANS vs. HENRY SMITH and others.

February 27, 1890.

Chattel Mortgage—Acknowledgment—Notarial Seal.—Where a certificate of acknowledgment was duly signed by a notary public, and his notarial seal was impressed upon the same paper, but "on the opposite side and end thereof," but plainly visible, and there was but one certificate to which the seal could be made applicable, *held* a sufficient authentication.

Action brought in the district court for Lyon county, for the conversion of two horses, claimed by both parties under chattel mortgages from the same mortgagor, that to defendants being the earlier. The issue of value was tried by a jury, who found the value to be \$96.75. The other issues were tried by *Webber, J.*, upon whose findings a judgment was entered for defendants, from which the plaintiff appeals.

H. C. Grass and *Daniel Rohrer*, for appellant.

F. S. Brown, for respondents.

VANDEBURGH, J. The legal question presented here is whether the certificate of acknowledgment of the chattel mortgage set forth in the record is properly authenticated, and arises upon the following finding of the court: "The mortgage is written upon one side of a sheet of paper, and is in proper form. Upon the other side of the sheet is a certificate of acknowledgment in proper form, and duly and officially signed by a notary public, but no notarial seal is impressed upon the side of said sheet on which said certificate of acknowledgment is written; but said seal is impressed upon the other side, that upon which the mortgage is written, and the impression thereof is distinctly visible through the sheet, and upon the side containing the certificate of acknowledgment, but at the opposite end of the sheet." There is no other certificate on the paper to which the notarial seal could be made applicable. It must be referred to, and be deemed to be the authentication of, the notary's certificate upon the same paper. The legal intendment from the record will be that the notary used his seal for such purpose in the discharge of his official duty.

Judgment affirmed.

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SUSAN R. EASTMAN *vs.* ST. ANTHONY FALLS WATER-POWER COMPANY.

February 27, 1890.

Riparian Owner—Deed of Water-Front and Land under Water—Construction—Evidence.—The defendant, in pursuance of its charter, erected dams in the Mississippi river at the falls of St. Anthony, and flowed land subsequently acquired by the grantors of the plaintiff, and afterwards procured from them a deed by which the latter granted and conveyed to the defendant "all the entire water-front, land under water, easements, and privileges in the Mississippi river upon, about, or appurtenant to," the government lot in question. At the time of the execution of the deed, the shore of the land above low-water mark was overflowed and covered with water, as it had been for many years in the ordinary stage of the river. *Held* that, in order to determine what land

passed by the deed, it was competent to receive evidence of the situation of the premises and condition of the river resulting from the operation of the dams at the date of the deed, and that a provision in the deed for additional flowage was not inconsistent with an intention to grant the fee of so much of the shore above low-water mark as was covered by water so raised by the dams.

Same—Description in Tax-Deed.—The land in question, claimed by the defendant, being under water, and extending from low-water mark to the margin of the river or water-line as permanently raised by the dams, *held* not to be included in the description of a tax-deed issued to the plaintiff embracing her land to the margin of the river, such description being generally of "land lying between Park St., in the plat of Nicollet island, and the Mississippi river."

Same—Double Taxation.—Where a general description in such deed may be satisfied by applying it to the land owned by one party, in whose name it is assessed, it will not be extended so as to embrace the land of another, particularly if it would lead to double taxation.

Action brought in the district court for Hennepin county, to determine defendant's adverse claim to "all that part of government lot 1, in section 23, town 29 north, range 24 west, commonly known as 'Nicollet Island,' lying northwesterly from the highway across said Nicollet Island known as Bridge street, and between Park street and the Mississippi river, according to the plat of 'Nicollet Island,' on file," etc.,—the plaintiff alleging title and possession in herself. The action was tried by *Lochren, J.*, who ordered judgment for defendant, which was entered, and from which the plaintiff appeals.

E. C. Chatfield, D. A. Secombe, and M. B. Koon, for appellant.

Benton & Roberts and E. M. Wilson, for respondent.

VANDERBURGH, J.¹ 1. The defendant corporation has improved the water-power at and above the falls of St. Anthony, in pursuance of its charter, so as to cause the water to set back upon the shore of Nicollet island, which is situated in the Mississippi river, a short distance above the falls. The facts are particularly set forth in the findings of the court, from which it appears "that for many years prior to the 20th day of May, 1867, the defendant had maintained, and

¹ Gillilan, C. J., was absent and took no part in this decision.

has up to this time continued to maintain, dams in the Mississippi river below Nicollet island, near the falls, which at the date referred to, and at all other times since, have raised and still raise the water about and upon the shores of said Nicollet island to the height of six feet perpendicular above low-water mark, and flow the shore and banks of said island to a considerable distance above low-water mark, according to the slope more or less of such shore and bank, and did so flow the same at that date, and had for many years prior thereto, forming the mill-pond of the defendant." On that day, the remote grantors of the plaintiff granted and conveyed to the defendant, its successors and assigns, certain real estate, easements, and privileges, described in the deed, which was soon after recorded, as follows: "All the entire water-front, land under water, and rights to grants under water, easements, water-power, and privileges in the Mississippi river, upon, about, of, or appurtenant or belonging to, or connected with, lot number one, (1,) in section number twenty-three, (23,) of township number twenty-nine (29) north, of range number twenty-four (24) west, commonly known as 'Nicollet Island,' and lying above the falls of St. Anthony, to the centre of the channels on each side of said island, together with the right to the free use and occupation of, and the right of way along, around, and upon all the shores of said Nicollet island, for the purpose of attaching thereto or moving any logs, timber, rafts, boats, or other property lying in said river; and also the right and privilege of constructing and maintaining any and all dams, piers, booms, or other erections in the Mississippi river, to the centre of both channels opposite the said island, or between the said island and the said falls, that the said party of the second part, its successors or assigns, may deem proper to the complete and full development of this and their other water-power at the falls of St. Anthony; and all or so much of said island as shall be flowed by water from such dams or other erections, and the right of flowing the same." The immediate grantors of plaintiff, then being owners of the island, caused a survey and plat thereof to be made, a record of which was duly made, upon which a street called "Park Street" was laid out on the margin or summit of the bank of that part of the island to which this controversy relates; and between

the "out limit" of that street and low-water mark of the river lie the premises in dispute in this action, varying in width from 20 to more than 100 feet, according to the slope of the banks, the lower part thereof being flowed as aforesaid by the defendant's mill-pond. This strip of land, the trial court held, belongs in part to the plaintiff and in part to the defendant, the line of division being the water-line or margin of the river as raised upon and along the shores of the island by the dams maintained as before stated; that plaintiff's ownership was subject to the right of flowage and other rights and easements granted to the defendant by the deed referred to; and that so much of the land as lies between low-water mark and the margin of the river above it, as so raised along the shores of the island in the defendant's mill-pond, at the ordinary stage of water, by the defendant's dams, as such dams stood on May 20, 1867, and prior thereto, with the right of flowage and other rights and easements granted by the deed, belongs to the defendant in fee.

By its act of incorporation (Laws 1856, c. 137, § 9) the defendant was authorized, for the purpose of the improvement of its water-power above and below the falls of St. Anthony in the Mississippi river, "to maintain the present dams and sluices," and to construct and maintain dams, etc., and to make "any and all other improvements in the Mississippi river, upon the property owned or to be owned by said corporators, which may be necessary for the full enjoyment of the powers herein granted." No authority was or could be conferred thereby to enter upon, or to flow, or make any improvements upon, the shores of Nicollet island in pursuance of the authority of the charter, beyond or further than was incident to the rights of the public in the river as a navigable stream, without the consent of its owners. *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, (2 N. W. Rep. 842.) Under these circumstances, and with their dams and incidental improvements already made and maintained, the defendant acquired, as grantee, the property and rights, whatever they may be, conveyed by the deed of May 20, 1867, which, by a well-established rule of construction, must be interpreted most favorably to the grantee, as to any matter of doubt or uncertainty touching the description or the extent of the grant.

The contention between the parties arises upon the construction of this deed. The parties thereto seem, from an abundance of caution, to have intended to be very explicit and careful in the terms used in defining the grants and privileges conveyed. What may be termed the first clause is evidently on its face intended to be a grant *in presenti* of any land in the river answering to the description; and, if the grantor was seised of any such land, it passed by the deed, together with the other privileges and easements enumerated. It is evident that something more than the right of flowage was intended by the language used, which, it will be observed, is "all the entire water-front, land under water, and rights to grants under water, easements, water-power, and privileges in the Mississippi river, upon, about, of, or appurtenant or belonging to, or connected with, lot number one, section 28, * * * commonly known as 'Nicollet Island,' to the centre of the channels." A river is composed of bed, banks, and water or stream. It is generally understood that the river-bed terminates where the banks begin, that is, at low-water mark. The term "river-front" must be given some force and effect in interpreting the deed, and ascertaining the intention of the parties. It evidently was not intended to refer to any part of the "river-bed," but is a description applicable to the shores above low-water mark, and, used in connection with "land under water," lends support to the construction placed upon the deed by the trial court, that it was intended to grant the submerged land above low-water mark, as defined and limited by the court; and it is unnecessary to consider whether the language of the deed is susceptible of a construction in any respect more favorable to the defendant.

As found by the court, the shores of Nicollet island above low-water mark had been overflowed for a long time, and would remain so by the natural operation of the dams if maintained; and, in order to determine what land passed under the general language used in the deed, it was proper to receive evidence of the situation of the premises, and condition of the river, at the date thereof. *Salisbury v. Andrews*, 19 Pick. 250; *Butler v. Huse*, 63 Me. 447, 458.

The several parts of the deed are not inconsistent. The additional grant of the right of flowage which might necessarily result from

dams and other erections authorized to be made in the river for the complete development of the water-power, was not inconsistent with the grant of the overflowed land. Such flowage, which, indeed, would necessarily be incident to the right given to erect other dams and make further improvements in the river, might extend to land not acquired by the defendant in fee, and the limits of which could not, in advance, be definitely determined. *Morse v. Marshall*, 13 Allen, 288. Nor do we conceive there would be any practical difficulty in determining the artificial boundary or shore line established by the normal stage of water in the pond by the use of the dams. In high water, the dams might be overflowed, and in low water the river might be drawn down; but the general level of the water in the pond, as raised by the dams, and determined by a fair and proper use thereof, would seem capable of being readily fixed by observation and measurement. *Id.* The title to the land in question must be held to have passed to the defendant as claimed.

2. The plaintiff also claims title to the *locus in quo* under a tax-sale, the time for redemption having expired. As the court finds, the land "is described in the certificate as owned by W. W. Eastman and John L. Merriam, (plaintiff's grantors before referred to,) and as being all that part of lot 1, in section 23, township 29, range 24, lying between Park street, in the plat of Nicollet island, and the Mississippi river," and follows the assessment. The question arises whether this description includes the lands above low-water mark which passed by the deed to the defendant, already construed in this opinion. The defendant's contention is that it is limited to the margin of the river as raised by the dam, and therefore excludes its land; and we think this is the correct view. (1) The land conveyed to defendant became part of the water-power property considered as an entirety, and is presumed to have been assessed with, and as a part of, the real estate and improvements connected therewith. *State v. Minneapolis Mill Co.*, 26 Minn. 229, (2 N. W. Rep. 839;) Gould, Waters, § 307. (2) On the other hand, in view of the situation and title of the property, the description used in the tax proceedings is satisfied by limiting it to the land actually owned by Eastman and Merriam, and what should lawfully be assessed to them, extending

to the river as defined by the new and permanently established water-line as made by the dams. The title of each party being of record, it will not be presumed that the separate property of different parties is embraced under one general description in tax proceedings, if the same may be applied and limited to the land of one, and not to that of the other. The description, when applied to the subject-matter, as it properly may be, is susceptible of the construction claimed for it by the defendant. An opposite construction would be misleading, and involve double taxation, and ought not, therefore, to be upheld.

Judgment affirmed.

ELLA A. TICE *vs.* ROSWELL P. RUSSELL.

February 27, 1890.

Principal and Agent—Evidence of Authority.—Where an agent, by the authority of his principal, acts generally for him in a particular department of his business, or assumes so to act, with the knowledge and consent of his principal, in dealing with third persons, who are thereby induced to rely on the authority of the agent, the principal is bound by his acts.

Redemption from Execution Sale—Extension of Time by Waiver—Estoppel—Notice.—It is competent for a creditor who has purchased the land of his debtor upon execution sale to waive his strict legal rights in respect to the time for redemption; and, if his acts relied on by the debtor to constitute such waiver are equivalent to an estoppel *in pais*, he is bound by them, and a reasonable time after notice must be allowed the debtor in which to redeem.

Evidence *held* sufficient to require a consideration of the case upon its merits by the trial court.

Appeal by plaintiff from a judgment of the district court for Hennepin county, where the action was tried by *Young, J.*, and a dismissal ordered at the close of plaintiff's case.

Wilson & Van Dertip, for appellant.

43	66
47	435
43	66
50	314
51	420
43	66
78	270
43	66
79	821
43	66
80	344
43	66
82	77

Gilger & Harrison, for respondent.

VANDEBURGH, J. Judgment was rendered in the defendant's favor in proceedings to enforce a mechanic's lien upon the premises in controversy, and a sale thereon was had, and the property bid in by defendant, on the 24th day of September, 1887; and the period of redemption expired on September 24, 1888. The amount for which the premises were sold is the sum of \$935.47. The premises sold are alleged by the plaintiff to be of the value of \$9,000, and admitted by the defendant to be worth the sum of \$8,000. There was a prior mortgage upon the property for \$4,000. The action is substantially for leave to redeem from such sale after the time had expired, and is based upon the alleged promises and assurance made by the defendant to the plaintiff's agent, and acted on by him, that she would be permitted to redeem, as well after as before the expiration of the time of redemption, upon paying the amount due in money pursuant to a statement to be furnished by the defendant. The action was dismissed at the close of plaintiff's evidence. We are to determine whether there was evidence in plaintiff's behalf, reasonably tending to support plaintiff's cause of action, for the consideration of the court upon the merits. We are of the opinion that there was.

1. It appeared that one David Tice acted for plaintiff in conducting the negotiations with defendant or his agent in respect to the redemption, and the evidence is sufficient to show that he was authorized so to act.

2. And so, also, the evidence in the case reasonably tended to show that one R. P. Russell, Jr., was authorized to represent the defendant in the negotiations and proceedings alleged to have been had between them touching the time and conditions upon which the redemption might be made. He seems to have had general charge for the defendant of the lumber business of the latter, and had a share of the profits. He also had charge of the collections and the securities obtained through the filing of liens. He appears to have been acting generally for the defendant in this particular department of the business of the latter, with his authority or consent. The negotiations in question, while pending, were known to the defendant; and, assuming the truth of the evidence in the case, it is sufficient to show

that the defendant's son was acting with his authority, and might extend the time for the redemption of the premises, as it is claimed he promised and agreed to do.

3. The contention of the plaintiff is that the defendant promised and agreed not to stand upon his strict statutory right in respect to the time of redemption, and that, relying upon his promises and conduct, she was led to delay the tender of the redemption money until after the day. It is competent for a party to waive his strict legal rights as to the time of redemption, and agree to allow a redemption at a subsequent time; and, if the acts relied on to constitute such waiver are equivalent to an estoppel *in pais*, he is bound by them, and a reasonable time after notice must be given the other party in which to redeem. It is not a sufficient ground for relief that a party has made a mistake as to his legal rights, or has been under a misapprehension as to the intentions and purposes of the lienholder, unless the same was induced by him. But the conduct of the latter must be such as reasonably to mislead the debtor or redemptioner, and such as, if relied on by the latter, the former ought not in equity and good conscience to be permitted to repudiate. The weight and credibility of the evidence will be for the trial court, when it comes to find the facts; but we think there is evidence reasonably tending to show such waiver in this case. The negotiations began early in the summer. Plaintiff was embarrassed by the existence of the prior mortgage on the premises in attempting to raise a further loan for the redemption-money. Her evidence shows that from the beginning she was assured by his agent that all the defendant wanted was the money, and that he did not want the property; that in response to her request he promised that she would be furnished a statement in due season of the amount required, and of the date when she would be obliged to redeem. She claims that she was led to understand and believe that she might redeem in a reasonable time, as well after as before the expiration of the time of redemption, and particularly from the result of an interview and consultation with the defendant's agent in September, in which the testimony shows that her agent "informed him of her difficulty in raising the money, and asked for a statement of the amount required to redeem,

and when the time of redemption would expire; and that he had promised to furnish a statement, and on my expressing my fear that the time would expire, he [defendant's agent] said that would not make any difference; he would take the money at any time, as he did not want the property. * * * He said a little time would make no difference; he would receive the money at any time." Plaintiff relied on this promise. No statement was furnished, and no notice given plaintiff limiting the time for closing the negotiations. The plaintiff made efforts to meet the defendant again before the day, September 24th, but failed, and in October afterwards tendered him the amount of the debt and interest, which was refused. The evidence, we think, tended to prove a temporary waiver, at least, by the defendant, which had not been recalled by any notice or demand of performance when the tender was made, and which could not be disregarded or recalled by him until a reasonable time given for performance. 6 Wait, Act. & Def. 714.

Judgment reversed.

43	55
47	330

JOHN B. OLIVIER and another *vs.* HENRY D. GURNEY.

February 27, 1890.

Taxes—Insufficient Description in Published Delinquent List.—The description of the property in controversy in the published list of delinquent taxes for the year in question *held* not to be substantially a copy of the delinquent list filed, and not sufficiently definite and certain to uphold the tax-title claimed to have been acquired by the defendant.

Action brought in the district court for Washington county, to recover possession of lot 3, section 8, town 32, range 21, with \$6,000, the value of the use and occupation of the lot for six years next before suit brought. At the trial before *McCluer, J.*, it was stipulated that plaintiffs had title unless a tax-title relied on by defendant was valid, in which latter case the defendant should have judgment;

also that the issue of title should be first tried by the court, and that plaintiffs' claim for use and occupation and defendant's claim for improvements should remain open until after the question of title should be determined. The court held the tax-title bad. The defendant appeals from an order refusing a new trial.

Clark, Eller & How, for appellant.

Uri L. Lamprey, for respondents.

VANDEBURGH, J. The question involved here is the validity of the tax-title claimed to have been acquired by the defendant to the lands in controversy. One ground upon which it is attacked is that the published list does not contain a correct description of such land. The land in controversy is correctly described in the county auditor's list of delinquent taxes for the year in question as follows:

In whose name assessed.	Subd.	Sec.	Town.	Range.	No. acres.	Tax.
H. D. Gurney.	Lot 8	8	32	21	23 $\frac{1}{2}$	1 71

But in the published list, as shown by the return, the description relied on appears at the head of the tenth column thereof, as follows:

Name.	Lot.	Sec.	Acres.	Amt.
Guernsey, H. D.	3	8	23 $\frac{1}{2}$	1 71

Other descriptions follow; and lower down in the same column, and extending across it, appeared "Town 32, Range 22," and at the bottom of the ninth column appeared, in like manner: "Town 32, Range 21." The return fails to show the location of other townships and ranges on the list, and does not show that any were placed at the head of the list; but it is expressly stated that after the notice the list proceeds as follows:

"Names of owners.	Subd. of sec.	Sec.	Acres.	Amt."
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The point made that the published list is not a correct copy of the list filed, and that upon the list itself, as published, as shown by the return, it does not appear with sufficient certainty in which township or range the lands are included, must be held to be well taken. This, we think, is not covered by the explanatory recital that the town and range were printed across the column in separate lines, and that under such lines appeared the subdivision of the section. This would

not relieve the uncertainty if there were no town and range placed at the head of the list, and it does not appear that there were, but the fair inference is to the contrary.

Order affirmed.

MATHIAS HARROW *vs.* ST. PAUL & DULUTH RAILROAD COMPANY.

February 27, 1890.

Damages for Destruction of Chattel—Market Value, how Proved.—

Upon an issue in respect to the value of a chattel, in an action to recover for the destruction thereof, the measure of damages is its market value. Evidence of its intrinsic qualities is not, as a rule, alone sufficient to establish such value. Additional evidence is required, and that which is commonly received is evidence of the opinions of witnesses shown to be competent to speak on the subject, and which is to be considered and weighed by the jury in connection with the evidence of the description of the property.

Same—Value of Horse—Jury's Estimate based on Description.—In an action to recover the value of a horse, *held* error to instruct the jury that they might find its value upon a description thereof given by witnesses, and from their own general knowledge of the value of horses, without additional evidence.

Appeal by defendant from an order of the district court for St. Louis county, refusing a new trial after a trial before *Stearns, J.*, and verdict of \$195.58 for plaintiff.

James Smith, Jr., and *H. Oldenburg*, for appellant.

H. H. Hawkins and *S. E. Cheeseman*, for respondent.

VANDEBURGH, J. 1. There is sufficient evidence that the horse for the value of which this action is brought, was killed on the line of defendant's road by one of its trains, and beyond the limits of the depot-grounds. There is also evidence tending to show that the cattle-guard above or beyond which the horse was found after he was killed was insufficient to prevent him from passing over to the place where the injury probably occurred, and that the defect was one of

construction. So that, for the purposes of this appeal, there is evidence sufficient to show that the injury complained of resulted from the negligence of the defendant. This disposes of the first assignment of error; and the point that plaintiff was guilty of contributory negligence in allowing his horse to run at large near the track is not assigned as error, nor included in any assignment made.

2. The only remaining question of any importance is embraced in the fourth assignment, relating to alleged errors in the charge of the court excepted to by the defendant. The particular portion of the charge objected to is the instruction in respect to the sufficiency of the evidence to warrant a verdict for the damages claimed, that is to say, the value of the horse, which is alleged in the complaint to have been \$200. No witnesses were called upon the question of value, and the issue as to the damages was submitted to the jury solely upon the evidence of the intrinsic qualities of the animal. As the particulars of the description showed its size, weight, age, etc., and as it appeared to be sound and well broken, it would be apparent that it must have been of considerable value; but this was not, alone, sufficient to form the basis for the verdict of a jury in respect to his fair market value, which is the proper measure of damages in the case, and the general rule is that there must be other evidence on the subject. Evidence of what an article cost, or what it sold for, in a *bona fide* transaction, is *prima facie* evidence of its value; but that which is most commonly received, and which is admitted *ex necessitate*, is the testimony as to its market value of witnesses who are shown to be competent to speak by reason of special knowledge on the subject, which it may be supposed the jury do not have. This evidence is generally received together with evidence of the intrinsic value of the property, and is to be placed on the same footing as other evidence in estimating its weight and value; and the jury, in determining the issue, are to form their estimate upon all the evidence bearing on it, and in doing so may, as in other cases, apply their own practical judgment, and general knowledge, upon the subject of inquiry. *Stevens v. City of Minneapolis*, 42 Minn. 136, (43 N. W. Rep. 842,) and cases; *Johnson v. Hillstrom*, 37 Minn. 122, (33 N. W. Rep. 547;) *Anthony v. Stinson*, 4 Kan. 211, 222; 1 Whart. Ev. § 447. The fact

that, in special cases, juries might arrive at a fair and just conclusion without special evidence in respect to the market value, or that juries may be embarrassed by the unreliability or divergent opinions of witnesses, is not sufficient to warrant the courts in setting aside a rule which experience has found to be necessary and important in the trial of actions for damages. We are of the opinion, therefore, that, in charging the jury in this case that they might find the value of the property in question as described to them from their own general knowledge of the value of horses, without additional evidence on the subject, the court erred. The order denying a new trial is accordingly reversed.

43	73
47	176
47	467
43	73
48	510

MARGARET J. MITCHELL vs. CHARLES S. MITCHELL and another.

February 27, 1890.

Will—Undue Influence—Evidence.—In determining the question of undue influence upon the mind of a testator in disposing of his property by will, the frame of the will and the nature of the testamentary dispositions are in themselves important evidence.

Same—What Constitutes Undue Influence—Testator's Prejudices.—

A testator may be affected by his prejudices and predilections arising from his associations and external influences, but, if he is of sufficient testamentary capacity, he may nevertheless dispose of his property as he pleases by will, if it be his own voluntary act. To constitute undue influence, the testator must be so controlled by persuasion, pressure, or fraudulent contrivance that he is not left to act intelligently and voluntarily, but becomes subject to the will or purposes of others. Evidence held sufficient to support the findings of the trial court.

Appeal by Margaret J. Mitchell, the contestant, from a judgment of the district court for Stearns county, *Baxter and Searle, JJ.*, presiding, refusing a new trial, after a decision sustaining the will of her late husband, James S. Mitchell.

D. W. Bruckart, D. T. Calhoun, and A. C. Robertson, for appellant.

O. W. Baldwin and Reynolds & Stewart, for respondents.

VANDEBURGH, J. The will of James S. Mitchell, deceased, was contested in the probate court by his wife, Margaret Mitchell, on the grounds that it was not lawfully executed; that the testator was not of sound and disposing mind and memory; and that "he signed the same under duress, menace, undue influence, and fraud." From the decree of the probate court establishing the will and admitting it to probate, the contestant appealed to the district court of Stearns county, where the case was duly tried by the court, no formal issues having been specially framed for a jury in pursuance of the statute. Upon the trial of the case in the district court, the issues were determined in favor of the proponents, and the contestant appeals. We have carefully examined the record in the case, and are of the opinion that the findings of the court are abundantly supported by the evidence, and that there is no ground for a reversal of the order denying a new trial. The findings of fact are sufficient to cover all the points upon which the will was contested, unless a more specific finding was necessary upon the issue of fraud; but there was no evidence tending to prove fraud, unless as appearing in the evidence relied on to prove undue influence. So that the findings as made are sufficient, for the purposes of this appeal, to protect the rights of the contestant; and all the evidence in the case tending to show any attempt on the part of relatives or others to control the testamentary disposition of his property by the decedent may properly be considered upon the issue of undue influence.

The deceased was an invalid, and the subject of medical treatment for a considerable time before his death, and was nervous and irritable in consequence of his sickness; but the evidence leaves no reasonable doubt of his sanity or testamentary capacity when he executed his will. Indeed, the full, intelligent, and apparently candid statements appearing in the testimony of the witnesses to the will, and the attorney who drafted it, as well as of the physicians who attended him, is very persuasive upon the question of the alleged undue influence. His brother, who was with him during his sickness, testifies that before the will was made he made minutes, at the request of the testator, of the proposed disposition of his estate, and

from these the attorney prepared a preliminary or skeleton draft of a will, and it was afterwards read over to the testator, and discussed between them; and it appears from the testimony that the plan of the will was then so much changed, at his dictation, that it became necessary to prepare a new one, which was thereupon done, to conform to the testator's ideas and wishes, and which was read over to him three or four times, and each clause separately and carefully explained and considered. It is sufficiently evident from the record that he was a person of intelligence, independence of mind, and decision of character, and that these characteristics were retained at the time the will was made; and, conceding that the property disposed of was his, the will, on its face, would not be deemed so unfair to contestant as to excite suspicion of undue influence.

The contestant claims, however, upon the evidence, that the estate held by him was largely the result of her own earnings and sagacity, and was in part received from her after the marriage. It is also insisted that his mind had become prejudiced against her through the interference and active influence of his relatives. The evidence shows mutual dislike between her and them, and that there was distrust on his part towards her in his last sickness; but how far his disposition towards her may have arisen from causes or differences arising between themselves, or how much he may have been affected by the prejudices of his relatives, (if at all,) does not clearly appear. All these matters, including the matter of the division and disposition of his property by him, we may assume were duly considered by the trial court. There is evidence in the case indicating anxiety on the part of some of his relatives to share in his property, but it is not clear that he was influenced by this. For example, his brother testifies that while he was absent, receiving medical treatment, his mother wrote to him expressing her wish that he would make his will, and leave his homestead to her. On being informed of this, however, he remarked that he had always intended to give her that property. A person will be influenced in the formation of his attachments and prejudices, by his associations, relationships, benefits or injuries received, etc. This is natural, and he may, in the exercise of his choice, dispose of his property according to his predilections thus

formed. But this alone is not enough to warrant an inference of such constraint or control over his will as to amount to undue influence, though it is a circumstance proper to be considered. *Horn v. Pullman*, 72 N. Y. 269, 277.

To constitute undue influence, the mind of the testator must be so controlled or affected by persuasion or pressure, artful or fraudulent contrivances, or by the insidious influence of persons in close confidential relations with him, that he is not left to act intelligently, understandingly, and voluntarily, but becomes subject to the will or purposes of another. *Marx v. McGlynn*, 88 N. Y. 357, 370. It is a testator's privilege to make such disposition of his property as he pleases; and, if the will is his,—that is, if it is the voluntary act of a competent testator,—it must stand, if properly executed in form. And when the proponents make a *prima facie* case of a valid will, as in this instance, the burden will rest necessarily upon the contestant to overthrow such case, and establish the undue influence complained of. We may well doubt whether, in any aspect of the case, the evidence of the contestant can be considered sufficient to support a finding in her favor on the question under consideration; but, as this case was determined after a full hearing on the merits, it is clear to us that the evidence on this issue was not sufficiently strong or conclusive to warrant us in setting aside the decision of the trial court.

Order affirmed.

MINNEAPOLIS INDUSTRIAL EXPOSITION vs. BALDWIN BROWN and another.

February 28, 1890.

Subscription for Gift to a Corporate Enterprise — Subsequent Agreement of Corporation with Single Subscriber.—A large amount of money had been subscribed by various citizens, to be paid for the purchase of a site to be donated to the plaintiff for an exposition building. According to the claim of the plaintiff, the defendant Brown obligated himself jointly with others by contract to donate to the plaintiff the land in question, (not then owned by any of the parties.) Allowing this to have been so, the rights of the plaintiff as against Brown would be modified by a subsequent agreement with him alone, (sufficient subscriptions not having been collected to make the purchase,) to the effect that he should personally advance the money necessary to purchase the land, and should take and hold the title as security for the repayment of the money so advanced. He having thus purchased the land, *held*, that the plaintiff was not entitled to a conveyance of it from him until he should be reimbursed the money so advanced.

Appeal by plaintiff from an order of the district court for Hennepin county, refusing a new trial after a trial by *Smith, J.*, and judgment ordered for defendants.

Fred B. Dodge, for appellant.

Hart & Brewer, for respondents.

DICKINSON, J.¹ This is an action to compel a conveyance by the defendant Brown of a tract of land forming a part of the ground on which the plaintiff's exposition building has been erected. The plaintiff claims to be entitled to such conveyance by reason of the offer or proposal expressed in Exhibit A of the case, which offer the plaintiff accepted, and the specified conditions of which it has fulfilled. It claims that a contract was thus entered into entitling it to a conveyance of this property, and that Brown subsequently acquired the title subject to that right in the plaintiff. The offer referred to was made in writing to the plaintiff's board of directors in January,

¹ Vanderburgh, J., took no part in this case.

1886. It states that, "at a meeting of the citizens of East Minneapolis, * * * the undersigned were appointed a committee to make the following proposition to your honorable body in behalf of the residents and property-holders of East Minneapolis, to wit: We offer to donate the property" (described.) Certain conditions are specified. The instrument was signed by this defendant Brown and two others, designated, "Committee representing the citizens of East Minneapolis." From the findings of fact by the court, it appears that soon after the acceptance of this offer, the defendant Brown and another of the persons whose names were subscribed to the offer (Gillette) reported to the plaintiff's board of directors as to the condition of the title to this land, (which appears to have been in persons not interested in this offer;) that an option for its purchase for about \$40,000 had been obtained, which would soon expire; that about that sum had been subscribed by citizens of East Minneapolis, (for the purchase of the site, as is to be understood;) that a part of that had been collected, and that collections were still being made, but that it was doubtful whether sufficient could be collected to effect the purchase within the time allowed for that purpose. It was agreed between the plaintiff's board of directors and Brown that the latter should advance the necessary amount of money and make the purchase, taking the title in himself, in trust for the plaintiff, and as security for the repayment of the money advanced for the purchase. This was then done, Brown advancing of his own funds about \$10,000 of the purchase price. All of this was done, and the plaintiff's board of directors was advised of it, before the plaintiff went into possession. The defendant was subsequently reimbursed (by the further payment of subscriptions) a part of the money advanced by him. There remains, however, still unpaid, the sum for which the court held the land still chargeable in favor of the defendant. The relief sought was refused, except upon the condition that this money be repaid.

It is unnecessary to refer to the defendant the Commercial Bank, except to say that the lien which it asserts is, in effect, identical with the claim made by Brown. Payment to the bank will satisfy the demand of Brown.

There is sufficient evidence to sustain the findings of the court in the direct testimony of Brown, whose large personal interest in the matter may have been regarded as most likely to impress upon his mind, and fix in his memory, the transaction in question; in the testimony of Gillette; and in the fact that the title *was* taken in the name of Brown, and that the plaintiff for a time, as the evidence tended to show, acquiesced in the title being so held, although it was making very valuable improvements upon the land. The court below did not deem it necessary to declare the effect of the proposal and acceptance; nor, in view of the findings of fact to which we have referred, do we consider it necessary. Even if it be assumed that the offer and acceptance constituted a valid contract, so binding Brown and his associates that, upon his subsequently acquiring title to the land, the plaintiff might, if nothing more had occurred, have maintained an action to have the title transferred to it without other conditions than those specified in the offer, it is further to be considered that it was still competent for the plaintiff and Brown to modify or change what the plaintiff claims to have been a complete contract between itself and the persons presenting the written offer. And this they did, according to the findings of the court. The agreement that Brown should personally provide the money necessary to purchase the land, and take the title to himself as security for reimbursement, was effectual, after he had carried the agreement into execution, as a defence to the claim now asserted by the plaintiff of an unqualified right to a conveyance from him. It is immaterial whether the later agreement placed the plaintiff in a more advantageous position than it occupied before. It is enough that it made the agreement which the other party has performed on his part. The plaintiff is bound by it, and its present claim of an unconditional right to a conveyance of the land, being contrary to that agreement, cannot be sustained.

Order affirmed.

ANTON MAGIN vs. GAYLORD LAMB, impleaded, etc.

February 28, 1890.

Action to set aside Judgment — Want of Jurisdiction. — An action may be maintained to set aside a judgment upon the ground that no process had been served, or jurisdiction acquired in any manner.

Same—Facts to be Proved.—In such an action, it is not incumbent on the plaintiff to show, in addition to the want of jurisdiction, that upon the merits of the matter the claim involved in the judgment was unjust. Modifying an expression *obiter* in *Heffner v. Gunz*, 29 Minn. 108.

Same—Action against Assignee.—Such an action is maintainable against the assignee of the judgment, if the plaintiff be not chargeable with laches.

Appeal by defendant Lamb (impleaded with Marcellus Pitts and others) from a judgment of the district court for Blue Earth county, where the action (brought to set aside a judgment of \$122.35) was tried by *Severance, J.*

B. D. Smith, Freeman & Pfau, and Hawes, Loman & Scofield, for appellant.

Lorin Cray and J. L. Washburn, for respondent.

DICKINSON, J. The defendant Lamb is the assignee of a judgment heretofore entered in the district court in favor of Pitts and others against Anton Magin. The plaintiff, alleging that no summons was ever served upon him in that action, that he did not appear therein, and did not know of the judgment until its enforcement was attempted, prosecutes this action to have the judgment set aside, and to enjoin its enforcement. It is conceded and claimed on both sides that this judgment is to be deemed as having been entered against this plaintiff, against whom the defendants were proceeding to enforce it when this action was commenced. The relief sought having been granted in this action, the defendant Lamb appealed from the judgment. The case is presented upon the pleadings, findings of the court, and the judgment, the evidence not being before us.

There is some controversy as to the meaning of the findings of the court. It appears that in the summons and complaint in the action-

in which the judgment in question was rendered, the person therein named as defendant was "Anthony Magin," and the proof of service of the summons, by the affidavit of a person not having official authority to make such service, named Anthony Magin as the person served. The court found as a fact that the summons was served on Anthony Magin. There being a default to appear in that action, judgment was entered against "Anton Magin." But the court further found that neither the summons nor complaint in said action were ever served on this plaintiff. Reading the findings of the court with regard to the issue made in the pleadings, they must be deemed to have the meaning that, while the summons was served upon a person named Anthony Magin, that person was not this plaintiff, and that no summons was ever served upon this plaintiff. The legal result is that the judgment was entered without jurisdiction having been acquired of the person of this plaintiff; and, assuming him to have been the person against whom the judgment was entered, it was void. The court further finds that this plaintiff did not know of that judgment until just before the commencement of this action.

The appellant contends that in this action the judgment is assailed collaterally, and that this is not allowable. This is not a collateral, but a direct, attack upon the judgment. That is the very object of the action. It was not necessary to make the original judgment creditors parties to the action. The judgment having been assigned to Lamb, he stands in their place, and is the only party in interest.

An action is maintainable to set aside a judgment upon the ground that there was no jurisdiction for want of service of process. *Ferguson v. Crawford*, 70 N. Y. 253; *Arnold v. Hawley*, 67 Iowa, 313, (25 N. W. Rep. 259;) *Jeffery v. Fitch*, 46 Conn. 601; *Caruthers v. Hartsfield*, 3 Yerg. 366; *Hickey v. Stone*, 60 Ill. 458; *Johnson v. Coleman*, 23 Wis. 452; *Freem. Judgm. (3d Ed.)* § 495. That a judgment may be set aside for such cause, on motion addressed to the court in which the judgment was entered, has been determined in *Heffner v. Gunz*, 29 Minn. 108, (12 N. W. Rep. 342;) *Lee v. O'Shaughnessy*, 20 Minn. 157, (173;) and *Stocking v. Hanson*, 35 Minn. 207, (28 N. W. Rep. 507;) and no substantial reason can be assigned why an action should

v.43m.—6

not be entertained for this purpose as well as a motion, especially when, under our system of practice, the action is in the same court in which the judgment was rendered.

In *Lee v. O'Shaughnessy* and in *Heffner v. Gunz* it was held, the judgment being absolutely void, that it was not incumbent on the moving party to show that he had a defence on the merits to such an action. It was enough that no action had been commenced against him. It was intimated *obiter*, in the opinion in the latter case, that in a suit in equity it would be incumbent on the plaintiff to show reasons for equitable intervention beyond the bare fact of want of jurisdiction; and such was the prevailing rule when the interference of courts of equity was sought to restrain the enforcement of judgments of separate courts of law. But the reasons for any distinction in respect to the conditions upon which relief is to be granted in an *action* to restrain or vacate a judgment, and in a *motion* for the same purpose, have disappeared with the uniting of equitable and legal jurisdictions in the same court. If now a defendant, upon motion to the court rendering the judgment, may have it set aside merely because no action was ever commenced against him, there is no longer any reason why, if he prosecutes an action in the same court, for the same purpose, any different grounds for relief should be required.

If the judgment was void, and not merely irregular or erroneous, the fact that it has been assigned does not prevent relief, if the party against whom it has been entered is not chargeable with laches. The assignee stands in no better position than the assignor, unless the plaintiff's rights have been prejudiced by some fault on his part.

The point made by the appellant that this plaintiff, if not served with process, is a stranger to the judgment and cannot assail it, is inconsistent with the position taken in the answer, in which it is conceded and claimed that the judgment was rendered against this plaintiff, and was in the course of being enforced against him.

Under the findings of the court, the subject of the difference between the names of "Anthony" and "Anton" is not material. This case is controlled by the fact, as found, that no summons was served upon this plaintiff; that he did not appear in the action; and that a judg-

ment was entered which both parties concede to be against him, and which the defendant was proceeding to enforce against him.

Judgment affirmed.

FRANCIS H. COBB and others *vs.* VERNON A. WRIGHT.

February 28, 1890.

False Representation of Title to Land held not Actionable.—A conveyance was made without consideration by plaintiff, an owner of an interest in real estate, to defendant, who, having an interest in the land, claimed to have title to the whole estate, and who, to induce the execution of the deed, made representations to the grantor, to the effect that the title of the latter had been divested by legal proceedings. The means of information were equally open to both parties. The grantor also consulted an attorney-at-law concerning his title, and executed the deed supposing that he had no title. *Held*, that he was not entitled to recover for the alleged fraudulent representations.

Action brought in the district court for Hennepin county, to recover \$3,800 damages for alleged fraudulent representations as to title to land. Appeal by plaintiffs from an order of *Young, J.*, refusing a new trial after a dismissal ordered at the trial.

R. B. Forrest, for appellants.

Chas. J. Bartleson, for respondent.

DICKINSON, J. This is an action to recover damages for alleged fraudulent representations of the defendant respecting the title to real estate, by means of which, as it is claimed, the plaintiff Francis H. Cobb was induced to execute to the defendant a deed of conveyance of the property, conveying gratuitously an undivided one-third of it. When the plaintiff had closed his case, the court dismissed the action. Upon this appeal from an order refusing a new trial, we are to consider whether the case presented on the part of the plaintiff would have justified a recovery. This action relates to a block in Cobb's addition to St. Anthony. In 1856 the land embracing that now in question was owned by the plaintiff Francis H. Cobb and his

father, Stephen Cobb. They platted the addition in that year, and soon after mortgaged the land to one Springer for the sum of \$3,400. In 1874, in an action for the foreclosure of the mortgage, an undivided two-thirds of the land was sold under decree. That sale was confirmed by final decree in 1879. By subsequent conveyances the title acquired by the purchasers at the foreclosure sale became vested in the defendant. The conveyance to him, made in 1885, in terms conveyed the entire estate. About 1864, Stephen Cobb, who had before lived upon the land, removed from that part of the state. He died in 1874. These plaintiffs are his heirs. The land does not appear to have been occupied subsequent to 1864 by any one under whom the plaintiffs claim. They paid no taxes subsequent to 1858, and the land was several times sold for taxes. In 1886, the plaintiff Francis H. Cobb held a power of attorney from the other plaintiffs to convey any land within the territory embracing that in controversy. The defendant then applied to him for a quitclaim deed of this land. He stated to the said plaintiff that he (defendant) knew all about the title, had examined it, and had it examined by attorneys; that the Cobbs had lost their title by the foreclosure of the Springer mortgage; referred, also, to the tax-titles; said the title was complete in him, but that he wanted a conveyance to satisfy the prejudices of some Scandinavians to whom he had made sales. The plaintiff at first declined to execute a conveyance, but after repeated solicitations he did so. Prior to doing this, however, he, at the defendant's suggestion, asked Mr. Jordan, an attorney, who had previously been employed by him in some real-estate matters, if he thought the Cobbs had any interest in the land. He expressed it as his opinion that they had not. The plaintiff had no actual knowledge as to the state of the title, although he had long known that there had been a foreclosure of the mortgage, but did not know that only an undivided two-thirds of the land had been sold under the decree. He knew, also, that it had been sold for taxes. The title had been examined by attorneys, who had expressed the opinion, which had been communicated to the defendant, that as to the undivided two-thirds there was no doubt respecting the title, and that they thought that the tax-title would be sustained.

The case being such as we have indicated, we think that the plaintiffs were not entitled to recover. The plaintiff, in this negotiation, stood on an equal footing with the defendant. If, in fact, there was any tenancy in common between them, he did not upon that ground repose confidence in the defendant, for he did not know that relation; nor did the defendant avail himself of such relation as a means to secure the end complained of. The parties dealt as strangers. The plaintiff was informed, notwithstanding the defendant's representations, that some persons interested in the land had raised questions as to the defendant's title, and that they were unwilling to accept that title without a conveyance from the plaintiffs. He knew that, if the plaintiffs had any remaining interest, this deed would be effectual to transfer it, and that the very purpose of it was to effect that result. From the very nature of the representations, he must be deemed to have known that the defendant's statements that he had the title, and that the plaintiffs' interest had been divested, could be but the expression of an opinion concerning the effect of legal transactions. He had the means of knowledge equal to those of the defendant. If, under those circumstances, he executed the deed conveying the interests of the plaintiffs, relying upon the mere representations of the defendant, he is not entitled to relief. He should be deemed chargeable with want of the ordinary discretion which the law requires men to exercise in their own behalf, if he executed a conveyance of real estate, trusting to the assurance of the grantee that it would convey nothing. Under such circumstances, neither courts of equity nor of law will ordinarily afford relief. *Morrill v. Madden*, 35 Minn. 493, (29 N. W. Rep. 193;) *Brooks v. Hamilton*, 15 Minn. 10, (26;) *Slaughter v. Gerson*, 13 Wall. 379; *Brown v. Leach*, 107 Mass. 364; *Parker v. Moulton*, 114 Mass. 99; *Ætna Ins. Co. v. Reed*, 33 Ohio St. 283.

Though it be conceded that under some circumstances false representations respecting title, inducing the making of a conveyance, may entitle the grantor to a remedy for the deceit,—as to which, however, see *Robbins v. Hope*, 57 Cal. 493,—yet we think that a right of action upon that ground can only be sustained under extraordinary circumstances, and certainly not under the circumstances of

this case. Not only do we think that the plaintiff who executed the deed was not justified in doing so, relying upon the bare representations of the grantee that the title of the plaintiffs had been divested by legal proceedings, but we cannot reconcile the claim of the plaintiff that he relied upon the representations as to title with the fact that before he executed the conveyance he asked and obtained legal advice upon the subject. It is to be presumed that Mr. Jordan was advised of the facts of the case upon which his opinion was sought and given, and that the plaintiff asked his opinion in order that he might learn whether the interest which the plaintiffs were known to have once had in the land had been divested. We do not think that the case would have justified the conclusion that the plaintiff executed the deed because he relied upon the representations of the defendant—the adverse party—as to the title.

Order affirmed.

MARGARET BELL and Husband *vs.* C. D. BAKER.

February 28, 1890.

Disaffirming Lease for Fraud—Promptness Requisite.—Rule, that one electing to disaffirm a contract for fraud must act promptly, applied in the case of a tenant continuing to occupy the leased premises for a long time after the discovery of the alleged fraud involved in the making of the lease.

Plaintiffs brought this action in the district court for Otter Tail county, to recover \$240 rent reserved in a written lease, and \$100 damages for breach of defendant's covenant to keep in repair. In his answer the defendant pleaded a counterclaim for \$200 damages for alleged fraudulent representations made by plaintiffs at the time of the execution of the lease. At the trial before *Searle, J.*, the jury were instructed to find for plaintiffs for the full amount claimed as rent, and also such damages as they should think plaintiffs entitled to. The defendant appeals from an order refusing a new trial.

Chas. L. Lewis, for appellant.

C. C. Houpt, for respondents.

DICKINSON, J. The plaintiffs rented to the defendant certain premises for the term of three years, commencing on the 1st day of April, 1885, at a stipulated monthly rental. The defendant occupied under the lease until July, 1887. In this action the plaintiffs seek to recover the rental for the time subsequent to that date. On the trial the defendant offered to prove that he was induced to enter into the contract by false and fraudulent representations of the lessors as to the condition of the premises as to warmth, and the purity of the water; which fraudulent representations the defendant had set forth in his answer. The court rejected this evidence, and instructed the jury that the plaintiffs were entitled to recover the rent specified in the written lease.

The ruling and instruction were right. The offer was insufficient to show a right of recovery, or counterclaim, of damages for fraud, even if, under the admitted facts of the case, the defendant had not precluded himself from the right to recover damages for that cause. The only effect that could be claimed for the evidence offered was that the alleged fraud avoided the contract. But, if the fraud had been established, it would only have rendered the contract voidable at the election of the defendant, and not void; and, if he desired to disaffirm the contract on that ground, it was incumbent on him to act with promptness after the discovery of the fraud. He could not, after such discovery, continue to treat the contract as still subsisting, availing himself of the benefits conferred by it, and afterwards relieve himself from the contract obligation by disaffirmance. The defendant, in his answer, admits that he discovered the fraud in the winter following the commencement of his lease, and that, nevertheless, he continued to occupy the premises for about a year and a half after that. There was nothing in the evidence offered to modify the effect of this fact as a ratification or affirmance of the contract.

Order affirmed.

EDWARD L. LARSON vs. MARTIN RING and others.

April 2, 1890.

Act Negligent in Itself—Evidence of Custom.—An established usage or custom among men engaged in the same line of work cannot be given in evidence to justify or excuse the commission of an act negligent in itself.

Same—Stretching Ropes across Streets—City Ordinance.—A city ordinance, regulating the placing of guys and ropes across the public streets, cannot be introduced in evidence upon the trial of a case in which negligence is charged, for the purpose of showing at what distance above the street the authorities regarded it as safe and proper to stretch guys and ropes.

Same—Grant of Privilege by City.—A grant of powers and privileges by a city council to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of such powers and privileges.

Action brought in the district court for Hennepin county against defendants Ring & Tobin, partners, and the city of Minneapolis, to recover \$5,000 for personal injuries. At the trial, before *Hooker, J.*, the plaintiff introduced evidence tending to prove that about six o'clock in the evening of December 4, 1888, he was standing at the rear end of an express wagon, passing through 4th street in Minneapolis. The wagon was loaded with saloon furniture; the floor of the wagon was about three feet and four inches above the street-level, and standing on it was a mirror about five feet high. It was dark or growing dark, and as the wagon passed under a wire guy-rope, which the defendants Ring & Tobin had stretched across the street to sustain a derrick on an adjoining block, the rope caught the mirror, and, flying off from it, struck plaintiff on the head and threw him to the ground, causing the injuries complained of. The defendants introduced evidence tending to prove that the rope was more than 13 feet above the street at the place of the accident. They also introduced in evidence (the plaintiff excepting) the following ordinance of the city: "Posts may be set up on the side of the roadway opposite any derrick, for the purpose of attaching guy-lines. * * * Guy-

lines attached to such posts shall be at least ten feet above the surface of the street." The court instructed the jury (the plaintiff excepting) that "it is not negligence to stretch that rope across the street unless you find that they have violated the ordinance; the mere fact that a guy-rope extended across the street was not negligence of itself—the mere stretching of a guy-rope across the street," and that if the rope was more than ten feet above the street at the place of the accident, the plaintiff could not recover without proof of other negligence than the mere placing of the rope across the street. The exception to the admission of evidence of custom offered by defendants is stated in the opinion. The jury found for defendants, a new trial was refused, and the plaintiff appealed.

Thomas Canty, for appellant.

E. A. Campbell and *J. E. Waters*, for respondents Ring & Tobin.

Robert D. Russell, for respondent the City of Minneapolis.

COLLINS, J. Action for damages, based upon the alleged negligence of defendants Ring & Tobin, who were contractors engaged in the stone business, in stretching a guy from the top of a derrick, standing on private property, across a contiguous public thoroughfare, by which guy plaintiff claims he was swept from his wagon and injured.

1. The court erred in permitting defendants to show at what height or distance above the public ways it was usual for contractors to stretch or suspend guys and ropes. It is self-evident that the obstruction of a public street by the suspension of an article at an improper distance above its surface, by which, in the natural course of events, the passing traveller may be injured, is just as reprehensible as is the obstruction of the surface itself by the digging of a ditch or otherwise. In either case it is the act itself, and not the manner of performing it, which constitutes the invasion upon the paramount rights of the public. The established usage or custom cannot be allowed to justify or excuse that which is in fact negligence, and hence, if the defendant contractors negligently stretched the guy across the way,—that is, suspended it so low that the passer-by was liable to come in contact with it,—evidence that other contractors habitually did the same careless act was inadmissible. It only tended to show that other contractors were neglectful also. But this case should not

be confounded with those frequently arising, wherein the method and manner of performing certain work and doing certain acts are involved, and in which the alleged negligence of a party is not visible or apparent to the ordinary observer; such, for illustration, as would have arisen had the guy in question, put at a proper distance over the street, parted at one of its fastenings, and dropped upon the plaintiff. The usual manner of fastening, the custom among those engaged in such work, might then have been material and proper to aid the jury in determining whether the contractors had used due diligence, because their negligence would not necessarily be perceptible and manifest. It would depend largely, perhaps, on whether there had been adopted and used a way or means of fastening which, time, usage, and long experience had demonstrated to be reasonably safe.

2. The trial court also erred in receiving in evidence the city ordinance permitting and regulating the placing of guys and ropes over the streets. The undisputed testimony was that there had been no attempt to comply with the terms of the ordinance, and the avowed purpose of the defendants, when introducing it, was to show what was considered by the city authorities as a point of safety,—the distance from the surface of the street at which, in their judgment, it was proper to stretch a guy or rope. This was inadmissible and wholly immaterial; for the city authorities could not absolve the city, nor could they release the contractors, from the charge of negligence, if the guy or rope was not put high enough. A grant of powers and privileges by a city council to do certain things does not carry with it any immunity for private injuries which may result directly from the exercise of such powers and privileges. *Baltimore & Potomac R. Co. v. Fifth Baptist Church*, 108 U. S. 317, (2 Sup. Ct. Rep. 719.) See, also, *Sexton v. Zett*, 44 N. Y. 430. It follows, from our views upon the ruling in regard to the ordinance, that the court erred in its charge to the jury in relation to it. We discover no error in the other rulings complained of. A new trial must be had.

Order reversed.

ST. CROIX LUMBER COMPANY *vs.* LOUIS C. MITTLESTADT, Executor.

April 2, 1890.

Purchase of Stock from Corporation by its President at an Under-value—Ratification by Shareholders.—Four persons, G. A. T., W. C., A. K. D., and H. M. T., were the duly appointed and qualified executors of the last will and testament of L. E. T., deceased. G. A. T. and W. C. were also shareholders, and president and managing director, respectively, of a corporation in which said deceased held a majority of the stock at the time of his death. All of the shareholders of said corporation, including said executors A. K. D. and H. M. T., had full notice and knowledge, for about three years prior to the death of said G. A. T., of a certain transaction by which the person last named and said W. C. had, while said officers of the corporation, as well as executors of the will aforesaid, transferred to themselves, at par value, shares of the corporation stock worth more than par, which had been issued to another, and by him reconveyed, by consent of the shareholders, to the corporation, but, with said notice and knowledge, had acquiesced in the transaction, and had also ratified and approved it. *Held*, that after the decease of said G. A. T. the corporation could not recover in an action brought against his legal representative to compel a surrender, for the purposes of cancellation, of a certificate for said stock issued to the deceased in his lifetime.

Same — Right of Company to Avoid, when to be Exercised.—The transaction, at most, was voidable; and, if the corporation, or any of its stockholders, desired to repudiate and avoid it, the option so to do should have been exercised within a reasonable time after knowledge. This could not be done after an express ratification.

This action was brought in the district court for Washington county, and removed for trial to Ramsey county, and there tried by *Kelly, J.*, who ordered judgment for defendant and refused a new trial. Plaintiff appeals from the judgment.

Fayette Marsh and Clapp & Macartney, for appellant.

John D. O'Brien, for respondent.

COLLINS, J. The plaintiff corporation was organized in the year 1872, with an authorized capital of \$500,000. Of this sum, \$125,000 only has been subscribed and paid in. The defendant is the sole

executor of the last will and testament of G. A. Torinus, who died a stockholder in said plaintiff corporation, March 14, 1887. At the time of the decease of one L. E. Torinus, June 2, 1883, stock had been subscribed and paid for at par value, in said corporation, as follows:

L. E. Torinus	-	-	-	-	-	-	-	-	\$ 92,500
G. A. Torinus	-	-	-	-	-	-	-	-	5,000
William Chalmers	-	-	-	-	-	-	-	-	12,500
Andrew Schou	-	-	-	-	-	-	-	-	5,000
									<hr/>
									\$115,000

Shares to the amount in value of \$10,000 had also been subscribed by one Ruelberg, but he had returned the same to the corporation by consent, and they were treated and considered as unsold and unassigned shares. Four persons had been designated as the executors of his estate by the last will and testament of said L. E. Torinus, two of whom were G. A. Torinus and William Chalmers, aforesaid. All of these executors had duly qualified as such, and were present at a meeting of the stockholders of said corporation, held for the purpose of electing officers, on July 3, 1883. At this meeting, said G. A. Torinus, Andrew Schou, and William Chalmers were elected president, vice-president, and managing director, respectively, and, under the by-laws of the corporation, constituted, *ex officio*, its board of directors. On the same day (July 3d) they met as such board, and adopted a resolution "that the stock-book of said corporation be opened, for the period of ten days, * * * for the purpose of permitting subscriptions of the unsold stock of said corporation." Four days later, said G. A. Torinus and William Chalmers each subscribed for shares at a par value of \$5,000,—in all, \$10,000,—and which the court finds was the so-called Ruelberg stock. They were each charged with the par value thereof upon the books of the corporation. The transfers were made upon the stock-book, and later on the account against them balanced by entries to the credit of each. At this time (July 3d) this stock was worth more than par, but exactly how much the trial court was unable to determine. The proceedings in regard to this transaction were duly recorded by the sec-

retary upon the plaintiff's books, which were open for inspection at all times. The next annual meeting of the corporation was held July 29, 1884. Every living stockholder was present, and the estate of L. E. Torinus, deceased, was represented by each of the executors aforesaid. At this meeting the "minutes of the last meeting of the stockholders and directors were read and approved," the officers before mentioned were unanimously re-elected, and "thereupon the report of the officers of this corporation was read and examined, and accepted by the stockholders, in accordance with the by-laws in such case made and provided." As the by-laws, which, according to these minutes, were complied with, required the secretary to keep accurate and faithful books of account of all business and operations of the company, a record of the proceedings of the meetings, and to make and present at the annual meeting a full statement of the affairs of the company, it is obvious that this entire transaction was then made known to all concerned by means of the secretary's report. Nor is it asserted by the appellant that those present at the meeting were not advised of just what had transpired in regard to the stock subscription referred to. Prior to September 7, 1885, no steps had been taken looking towards the issuance of stock certificates to the shareholders in this corporation. At a directors' meeting then held, it was resolved by a majority vote that such certificates be issued, including certificates for the shares of stock subscribed for by Torinus and Chalmers in 1883; and certificates were duly issued to each of these persons pursuant to said resolution. The government of said corporation remained the same, substantially, from July 3, 1883, down to the day of the decease of Mr. Torinus, in March, 1887, as before stated. On June 7th of that year, at a meeting of the stockholders, —all being present or represented,—the affairs of the corporation were examined; and, according to the records of said meeting, declared "satisfactory." At this meeting, for some reason not stated, Chalmers asked permission, and was allowed, to surrender his certificate issued for the Ruelberg stock. August 12, 1887, plaintiff caused an entry to be made in its books of account whereby it placed to the credit of "G. A. Torinus, deceased, for and on account of" said stock certificate, the sum of \$5,000. The trial court found as a fact, and

the testimony justifies the finding, that the plaintiff corporation, and all of its stockholders, had full notice and knowledge of all the facts connected with the transfer of the stock in question to said Torinus as early as July 29, 1884, and with such notice and knowledge approved the same. This proceeding was commenced December 12, 1887; the object of the first cause of action mentioned in the complaint being to compel the defendant executor to surrender up to plaintiff for cancellation the certificate above mentioned, issued to G. A. Torinus in his lifetime. The plaintiff's appeal is from a judgment on this cause of action in defendant's favor entered upon the findings of the court.

The conclusion below was predicated upon the facts, which the court summarizes in one of its findings, that the corporation and each of its shareholders had full notice and knowledge of this entire transaction for a period of about three years anterior to the decease of Mr. Torinus; and, possessed of this knowledge, acquiesced in, ratified, and approved the same. As those who now complain, and for whose benefit, it is said, this action is prosecuted, acquiesced in these acts for quite a period of time, and, on more than one occasion during the lifetime of Mr. Torinus, after being advised of all that had been done, ratified and approved the same, they cannot now be allowed to assail and cancel the certificate issued to him. The transaction, at most, was voidable; and, if the corporation or any of its shareholders desired to repudiate and avoid it, the option so to do should have been exercised within a reasonable time after knowledge. It certainly cannot be done after an express and undisputed ratification. *Kelsey v. Nat. Bank*, 69 Pa. St. 426; *Mt. Washington Hotel Co. v. Marsh*, 63 N. H. 230; *Fleckner v. Bank of U. S.*, 8 Wheat. 338; *Hotel Co. v. Wade*, 97 U. S. 13; *Indianapolis Rolling Mill v. St. Louis, F. S. & W. R. Co.*, 120 U. S. 256, (7 Sup. Ct. Rep. 542.)

But the appellant urges that the corporation, and a part, at least, of its shareholders, the heirs-at-law of L. E. Torinus, deceased, are not bound by the failure to disaffirm prior to the death of G. A. Torinus, nor by the acts of ratification relied upon by the respondent, because the last-named person and William Chalmers were said executors. We shall not attempt to point out what duties were imposed

on these men as executors, under the peculiar circumstances, nor to define what their obligations and relations were in the dual capacity of executors of the will and officers of a corporation in which their testator held stock at the time of his death. It is enough to say that their co-executors, two in number, made no effort to repudiate the transaction, although informed about it, or to protect the estate from what they now aver has been a great injury to it. Upon the other hand, they were present at the meetings, and participated in the proceedings by which the acts of Torinus and Chalmers were indorsed and ratified. They were not obliged to actively approve, nor even to silently acquiesce in, any of these measures. The courts were then open to them, upon a proper showing, and without regard to the wishes of Torinus and Chalmers, to protect the estate from being wronged.

Judgment affirmed.

NOTE. A motion for a reargument of this case was denied April 24, 1890

ANDREAS M. MILLER *vs.* LUTHER MENDENHALL.

April 3, 1890.

48	95
43	120
43	96
47	213
43	95
52	63

Navigable Waters—Ownership of Bed.—The state holds the title to the soil in navigable waters to low-water mark in trust for the people, and chiefly for the protection of the right of navigation.

Same—Riparian Owners—Right to Fill to Point of Navigability.—

The riparian owner is entitled to fill in and make improvements in the shallow waters in front of his land to the line of navigability, and such improvements in aid of navigation are recognized as a public as well as private benefit. These rights pertain to the use and occupancy of the soil below low-water mark, and are valuable property rights, and the exercise thereof, though subject to state regulation, can only be interfered with by the state for public purposes.

Same—Effect of Establishing Dock Line.—The establishment of a dock or harbor line, in pursuance of legislative authority, is to be considered as giving to the owners of the upland the privilege of filling in and building out to such line.

Same—Agreements between Riparian Owners — Grants of Riparian Rights within Dock Line.—Where the owners of upland, bordering upon the Bay of Superior, in this state, after the establishment of the dock line, adopted a survey and plan of improvement for the use and occupation to such line of the submerged land abreast of the upland owned by them, in connection with the navigation of the lake, *held*, that they might not only possess, occupy, and improve the same themselves, in connection with the dry land, but might concede to other parties the same rights within the dock line, and might, by the appropriate covenants and stipulations in the deeds to their grantees of the upland, and of sites used or to be used and improved under low-water mark, obligate each and all to respect and recognize the validity of such grants made in conformity with the general plan of improvement of the premises within the dock line, all such grantees thus becoming parties thereto; and in such case a court of equity will not interpose in favor of a grantee of the upland to set aside prior deeds to grantees of sites in the submerged land.

Appeal by plaintiff from an order of the district court for St. Louis county, *Ensign, J.*, presiding, sustaining a demurrer to the complaint. The substance of the complaint is stated in the opinion. The prayer for relief is (1) that the conveyance from the Duluth Improvement Co. to defendant be decreed to be invalid; (2) that the cloud cast by that conveyance on plaintiff's title to the westerly half of block 27 be removed, and (3) for general relief.

Mahon & Howard, for appellant.

Walter Ayers, for respondent.

VANDEBURGH, J. This case involves the consideration of the riparian rights of the owners of lands abutting upon the Duluth harbor or Bay of Superior, in the shoals or land covered by water between low-water mark and the deep or navigable waters, and within the dock or harbor line established by the authority of the legislature. These waters are within the jurisdiction of the state and federal governments, and the state holds the title to low-water mark in its sovereign capacity, in trust for the people, for the purpose chiefly of protecting the rights of navigation. But, though the title is nominally in the state, the common right of the people is limited to what is of public use for the purposes of navigation and fishery; and the riparian owners are per-

mitted to enjoy the remaining rights and privileges in the soil under water beyond their strict boundary lines, after conceding to the state all the public rights. Gould, Waters, § 168. The right of access and communication with the navigable waters, which pertain peculiarly to the ownership of the upland, in order to be available and of practicable use, necessarily includes the right to fill in and to build wharves and other structures in the shallow water in front of such land, and below low-water mark, and the exercise of such rights, though subject to state regulation, can only be interfered with for public purposes; and such improvements are encouraged because they are in the general interest of navigation and commerce, and are a public as well as a private benefit. In *Dutton v. Strong*, 1 Black, 23, 32, it is said that, "wherever the water is too shoal to be navigable, there is the same necessity for such erections for lake navigation as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it." And in *Yates v. Milwaukee*, 10 Wall. 497, it is held broadly that these riparian privileges are to be treated as valuable property rights, which cannot be taken or interfered with for public use without compensation. *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, (17 N. W. Rep. 626.) And if a stranger makes a filling or an obstruction in the waters in front of his land, the owner of the adjacent upland may enjoin its continuance, or recover in trespass, if not in ejectment.

In the case before us the complaint shows that a corporation known as the "Duluth Improvement Company" was the owner of a large tract of land bordering upon the waters of Duluth harbor, which communicates with Lake Superior, and is navigable for large boats and vessels. In front of this land, and for a considerable distance into the bay, the water is shallow and not navigable; and, in pursuance of legislative authority, a dock or harbor line had been duly established by the city of Duluth, extending in front of, and at a distance of a thousand feet or more from, the low-water mark on the tract of land referred to. Thereafter the Improvement Company caused this land, together with the land in front thereof under water, out to the dock line, to be surveyed and platted into lots and blocks, piers, slips,

avenues, and streets, and caused a plat thereof to be duly made and recorded, under the name of the "Bay Front Division of Duluth," and thereafter proceeded to convey divers lots and parcels of the platted land, as well land under water as the dry land, to divers persons, by reference to the recorded plat, and by conveyances of the form set out in the complaint, and containing special covenants and stipulations, as hereinafter mentioned.

The complaint further proceeds as follows: "That on or about the 27th day of June, 1887, the said Duluth Improvement Company sold and conveyed to Luther Mendenhall, defendant herein, by deed duly executed, a copy whereof is hereto annexed and made a part of this complaint, the following described tract or parcel of land, the same being a part of the land hereinabove referred to, to wit: All that part of block twenty-seven (27) in the Bay Front Division of Duluth, first rearrangement, according to the recorded plat thereof, that lies easterly of a line through said block, parallel with and at equal distances from the lines dividing said block from block twenty-six (26) and from block twenty-eight, (28,) in said division. That said Duluth Improvement Company, on or about the 30th day of July, 1887, sold and conveyed to plaintiff, by deed duly executed, and identical in form with and containing the same covenants as the deed to Luther Mendenhall, hereinabove referred to, the following described tract or parcel of land, being a part of the land hereinabove referred to, to wit: All that part of block twenty-seven (27) in the Bay Front Division of Duluth, first rearrangement, according to the recorded plat thereof, that lies westerly of a line through said block parallel with and at equal distance from the lines dividing said block from block twenty-six (26) and from block twenty-eight, (28,) in said division, saving and excepting so much of said tract as lies within one hundred (100) feet of the south-easterly boundary line thereof, which said property so excepted is hereby dedicated for the perpetual use of a slip or water-way for the use and benefit of the owners and occupants of property abutting thereon. Plaintiff further alleges that the greater part of said block 27, so as aforesaid conveyed to plaintiff by the Duluth Improvement Company, consisted of dry land and shore, and that the same extended to the low-water mark on said bay. That

all of that part of said block 27, so as aforesaid conveyed to Luther Mendenhall by said Duluth Improvement Company, lies under the water of the bay, beyond the low-water mark of said bay, and in front of and between that part of said block 27 so as aforesaid conveyed to plaintiff, and said established dock or wharf line upon said Duluth harbor. That the said Luther Mendenhall claims title to the part of said block 27 so as aforesaid conveyed to him by the Duluth Improvement Co. under and by virtue of said deed of conveyance to him, and claims the right to cut off and exclude plaintiff from access to the navigable waters of said bay over and across his part of that block, and denies the right of the plaintiff to dock out or make improvements in front of his part of the block to the established dock line, and claims and asserts that all the riparian rights to which plaintiff would be entitled, as owner of the shore along said harbor, are absolutely cut off and limited by the conveyance so as aforesaid made to him, said Mendenhall, as also by the conveyance made to the plaintiff."

Following the descriptions in the deeds to these parties, and to other grantees of the platted lands above referred to, we find the following clauses, covenants, and stipulations, viz.: "Together with all the hereditaments thereunto belonging, or in any wise appertaining, but subject, nevertheless, to the reservations, exceptions, and conditions of this instrument. And the said party of the first part, for itself, its successors and assigns, does covenant with the said party of the second part, his heirs and assigns, that it has not made, done, executed, or suffered any act or thing whatsoever, whereby the above-described premises, or any part thereof, now are, or at any time hereafter shall or may become, imperilled, charged, or incumbered in any manner whatsoever; and the title to the above-granted premises, against all persons lawfully claiming the same from or under it, the said party of the first part will forever warrant and defend. It being the intention hereby to vest in the said party of the second part, his heirs and assigns, forever, the exclusive right to use, occupy, and enjoy the space covered by the above-mentioned lots, as laid down upon the said recorded plat of said Bay Front Division of Duluth, first rearrangement, and to estop the party of the first part,

its successors and assigns, from having or claiming the use or occupancy of said space by virtue of riparian ownership or otherwise. This conveyance is and shall be construed as a contract between the parties hereto. The character and extent of the premises and the rights and privileges thereunto appertaining, whether riparian or other rights, shall be determined solely by reference to the plat of said Division; and no rights or privileges of any kind shall pass by this conveyance except such as said plat shows to be appurtenant to the premises herein conveyed. The said party of the second part hereby estops himself, his heirs and assigns, from asserting or claiming that the lots or blocks, if any are shown on said plat, between the premises herein conveyed and the established dock line along the northerly side of the bay or harbor of Duluth, are not land, and estops himself from claiming or asserting any rights or privileges under this grant in any part of the territory covered by said plat, except such as would solely by reference to said plat vest in him."

The case come here upon appeal from an order sustaining a demurrer to the complaint. In connection with the general statement in respect to the rights of riparian owners already made, we are to consider the additional fact of the establishment of the dock or harbor line, and the effect of the restrictive covenants in the deeds to the respective parties. The court will take notice of the extensive commerce and great shipping interests which must be accommodated in the Duluth harbor, and which will require corresponding facilities in the way of local improvements, which must be made in great measure by private enterprise; and in this case we may assume that the plan adopted by the Duluth Improvement Company, in the survey and plat of the submerged land in connection with the upland, was one which was suitable and proper for the improvement and occupation of the same in the interests of navigation, so as to subserve the public as well as private interests.

The action of the state, through the legislature, in establishing the dock lines, is to be construed in connection with the established doctrine of riparian rights of which we have spoken, and the practical use permitted and necessarily made by riparian owners of land under water in front of the dry or upland. In *Aborn v. Smith*, 12 R. I.

370, it is said by the court that the owners of the upland are in such cases impliedly permitted to carry the upland forward to the harbor line, so that each owner will occupy the part abreast his own land. In *Gerhard v. Bridge Com'rs*, 15 R. I. 334, (5 Atl. Rep. 199,) and in *Engs v. Peckham*, 11 R. I. 210, 223, 224, it is held to be a permission and invitation by the state to the riparian owner to fill out and incorporate the flats with his upland to the line. *Eldridge v. Cowell*, 4 Cal. 80. In *Fitchburg R. Co. v. Boston & Maine R. Co.*, 3 Cush. 58, 71, it appeared that the legislature had established a harbor line for Boston harbor, but prohibited the extension of the existing wharves to the line without legislative permission. Afterwards the legislature passed an act authorizing the owners of certain wharves to extend them out to the line. This act was held to be a grant, and not a mere revocable license, (page 87;) and in *Hamlin v. Pairpoint Mfg. Co.*, 141 Mass. 51, 57, (6 N. E. Rep. 531,) a legislative authority to extend wharves to the channel of a river was held equivalent to a grant of a possessory title, if not an absolute interest in the soil. In *Norfolk City v. Cooke*, 27 Grat. 430, 438, the court treat the right to use and occupy the land within such lines with wharves, etc., as a qualified proprietary interest in the soil, sufficient to support an action for the possession. *Guy v. Hermance*, 5 Cal. 73; *Power v. Tazewells*, 25 Grat. 786. But the title of the state is not extinguished by such legislative action *merely*. In this country the generally accepted doctrine is that the *jus privatum* passes to the owner of the adjacent lands, and in this state extends to low-water mark, with the accompanying riparian rights, while the *jus publicum* belongs to the state, which holds the title to the soil under the water as trustee. "The sovereign is trustee for the public, and the use of navigable waters is inalienable." 3 Kent, Comm. 427. See *Com. v. Alger*, 7 Cush. 53, 89, 93.

The state is authorized to regulate the exercise of riparian rights in the interests of the public, and may also make concessions to private owners of possessory rights in the soil of navigable waters, the effect of which will be to give them private and exclusive rights equivalent to a grant. Gould, Waters, §§138-140. While the *public* right of navigation and fishery may not be extinguished until the waters

are excluded, yet after the submerged land is filled or occupied the riparian owner will have the exclusive right of possession, and the entire beneficial interest; and whether his dominion would be absolute, and his title indefeasible as against the state, is not necessary to inquire. *Union Depot, etc., Co. v. Brunswick, supra.* The action of the legislature in establishing a harbor line is to be construed as a regulation of the exercise of the riparian right; it settles the line of navigability, above which the state will not interfere; and is an implied concession of the right to build, possess, and occupy to the established line, which amounts practically to a qualified possessory title. 141 Mass., (6 N. E. Rep.,) *supra.* The importance and substantial character of these rights are recognized by the courts, and there is a growing tendency in different directions to give effect to contracts and grants in respect to riparian occupancy and improvements. *Norfolk City v. Cooke*, 27 Grat. 430, 436; *Parker v. West Coast Packing Co.*, 17 Or. 510, 515, (21 Pac. Rep. 822.) It is true the right of access and communication with the navigable water belongs exclusively to the riparian owner, except with his permission. But if in the case of a railway corporation he may, for a consideration, concede the right to occupy with its road-bed the land under the shore, and obstruct such communication, by a valid contract, which we presume will not be questioned, why may he not contract with natural persons to grant to them the right of possession and occupancy of building-sites within the dock line for wharves or elevators, for use in connection with navigation, or such other purposes, (the state not objecting,) as the grantees may be advised, with right of way, if need be, over his land, or, as in this case, impliedly over streets laid over the same, as designated in the plat and dedicated to the public use? In many instances, however, such right of entry or easement of passage may be found entirely unnecessary, the occupant having other means of reaching the *locus in quo*. If the riparian owner may make such improvements, and afterwards grant and convey his possessory title, or contract to do so, the courts ought not to stand upon so narrow a distinction as that he may not bind himself by contract that another may have and enjoy the same possessory rights in a particular site or lot which he has in it; for his right is

not a mere revocable license, though held in subordination to the public interest, and subject to some restraint for the general good as other property may be, though differently situated. *Com. v. Alger*, 7 Cush. 53, 95.

There can be no doubt, we think, that a lease of such property would be operative between the parties, and a subsequent purchaser of the upland, with notice and expressly subject thereto, would also be bound to respect the lessee's rights. In reference to a lease of a mill-site in the bed of the Mississippi river, (at a place not navigable,) this court say in *St. Anthony Falls Water-Power Co. v. Morrison*, 12 Minn. 162, (249, 254,) "It is not for a private individual, under a pretence of vindicating the abstract rights of the public, to set up the intrusion, in a private and civil action, for the purpose of repudiating his own solemn contract obligations."

In this case the respondent does not find it necessary to question the correctness of the decision in the case of *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, (38 N. W. Rep. 200,) because there the grantor simply undertook to convey a strict legal title, which until the land was reclaimed could not be the subject of transfer, and we are not called on to distinguish that case. But this case is rested upon the contract of the parties, incorporated in the several deeds, in which it will be seen the grantor covenants that the grantees and their assigns "shall have the exclusive right to use, occupy, and enjoy the space covered by the lots" as described in the deed, and as identified by the plat, and covenants "to estop the company and its assigns from having or claiming the use and occupancy of said space by virtue of riparian ownership or otherwise." Here there is an express waiver and concession of the grantor's riparian rights in the premises, and consent to the use and occupancy thereof, so as to cut off its access and communication with deep water, except in accordance with the general plan of improvement indicated by the plat. And this is also made a part of *plaintiff's contract*, and undoubtedly entered into and affected the consideration of the deed to him. He thereby made himself a party to the general plan and arrangement for the improvement and disposition of the property, in which there was nothing unlawful. He

took with notice of defendant's deed. We see no reason why he should be relieved from the legitimate operation of these covenants, or why a court of equity should interpose to cancel or declare null and void the defendant's deed, in order to give the plaintiff rights he has expressly agreed to waive.

Order affirmed.

HEBER H. HANFORD and another vs. ST. PAUL & DULUTH RAILROAD COMPANY.

June 10, 1889.

On Reargument, April 8, 1890.

Riparian Rights.—The person entitled to the exclusive right to possess and use land abutting on a navigable lake or river is also, though he does not own the fee, entitled to enjoy the riparian rights incident to the land.

Same—Condemnation of Upland.—And so, where a railroad company procured to be condemned, for its use, land abutting on the Bay of St. Louis, it acquired the riparian rights belonging to it, although the petition for condemnation made no express mention of such rights.

ON REARGUMENT.

Riparian Right of Reclamation—Severance from Upland.—The right of a riparian proprietor upon navigable waters to improve, reclaim, and occupy the submerged lands out to the point of navigability, although originally incident to the riparian estate, may be separated therefrom, and be transferred to and enjoyed by persons having no interest in the original riparian estate. Overruling *Lake Superior Land Co. v. Emerson*, 38 Minn. 406.

Same—Condemnation of Upland.—A condemnation by a railroad corporation of the upland abutting upon the water, held to embrace also the incidental riparian right of improvement and occupancy of the submerged lands, although no specific mention is made of riparian rights.

Same—Petition held Sufficient.—The specific mention and including in the same petition of riparian rights in respect to other lands belonging to other persons, *held* not to affect this construction of the petition and proceedings in respect to the land in question.

Plaintiffs, claiming to be the owners of certain land in St. Louis county, brought this action in the district court for that county to restrain the defendant from constructing a railway track in front of their land and between it and the dock line in the Bay of St. Louis, thus cutting them off from access to navigable water. The action was heard before *Stearns, J.*, upon the pleadings and an agreed statement showing the facts to be as follows: In September, 1869, the Lake Superior & Mississippi Railroad Co. (to all of whose franchises, rights, and property the defendant has succeeded) filed its petition in the district court for St. Louis county for the condemnation of 35 different tracts of land, belonging to different owners, for the purposes of its railway and pursuant to its charter. The description of the tracts numbered 3, 4, and 5 was by metes and bounds, followed by the words "so as to include riparian rights and privileges" (in the 3d) or "including all riparian rights," in the 4th and 5th. The description of the 6th tract was as follows:

"No. 6. Commencing on section line between sections 3 and 4, township 49 north, of range 14 west, at the northeast corner of block one in the town of Rice's Point; thence north on the said section line to a point 950 feet south of the northeast corner of section 4 of said township; thence northwardly by a line parallel to and 200 feet from the centre line of the railroad located through said tract to a point 100 feet south of the centre of the main line in lot 4, section 33, township 50, range 14 west; thence southwesterly on a line parallel to the centre line of said railroad, and distant 100 feet from said line, into the Bay of St. Louis, including all the premises between the lines so described and the said Bay of St. Louis, as designated on said Exhibit A," [which was a map, filed with the petition.] "That so much of said premises as lies within lot 1, section 4, township 49, range 14 west, is owned by the Western Land Association, E. C. Clark, E. F. Ely, John A. Thompson, and North Albert Posey."

Commissioners were thereupon duly appointed, and in their report

(duly filed December 27, 1869) they awarded as compensation for the taking of the land above described the sum of \$800. In each instance ~~the commissioners~~, in their report, follow the descriptions in the petition, and make no mention of riparian rights except in case of the three above-mentioned tracts numbered 3, 4, and 5. The railway company thereupon entered into possession, and Posey, on January 22, 1870, appealed from the award. On January 16, 1873, Posey, while his appeal was still pending, platted into town lots a tract of 11 acres, calling it "The North Albert Posey Tract on Rice's Point"—the plat being made and recorded without the company's consent, and at a time when that part of the platted tract which was included in the above described tract No. 6 was actually occupied by the company for railway purposes.

Prior to the beginning of this action the plaintiffs, Heber H. Hanford and Alva W. Bradley, acquired and still hold all Posey's interest in certain of the platted lots and blocks. The land thus conveyed to plaintiffs and described in the complaint lies west of the easterly line of tract No. 6, described in the condemnation proceedings, and borders upon the navigable waters of the Bay of St. Louis. Such of it as is upland or above low-water mark is within the boundary lines of said tract No. 6, and the rest of it is below low-water mark and between the shore line of tract No. 6 and the dock line established in 1883, by the city authorities of Duluth, pursuant to Sp. Laws 1881, p. 62. This dock line in front of tract No. 6 is about 850 feet from the shore, the intervening space being covered with water naturally too shallow to admit of navigation by the class of vessels generally visiting the harbor of Duluth.

In 1877 the defendant acquired all the property, rights, and franchises of the Lake Superior & Mississippi Railroad Co., and in 1879, pursuant to Laws 1879, c. 82, and before Posey's death, paid into court the amount of the award for tract No. 6, with interest. Afterwards, in 1886, these plaintiffs and one Edward L. Bradley, brought ejectment against this defendant and the Northern Pacific Railroad Co. for the lands described in the complaint, in which action judgment was rendered for the defendants. (See *Bradley v. Nor. Pac. R. Co.*, 38 Minn. 234.) Upon these facts the court ordered judgment

for the plaintiffs; a new trial was refused, and the defendant appealed. The case was first argued at the April term, 1889, when the first of the following opinions was filed.

Ensign, Cash & Williams, for appellant.

Wm. W. Billson, for respondents.

GILFILLAN, C. J. In 1869 the Lake Superior & Mississippi Railroad Company, to whose rights this defendant succeeded, commenced proceedings in the county of St. Louis to condemn for its use for railroad purposes lands in that county, some of them lying near to or touching upon the Bay of St. Louis, or on Superior Bay, or on Lake Superior. The petition by which the proceedings were instituted described the land more particularly involved here by describing certain lines and then continuing: "Including all the premises between the lines so described and the said Bay of St. Louis," so that the land thus described abuts on the bay. The description makes no mention of riparian rights. The petition described 35 distinct tracts of land, parts of which were proposed to be taken, in three of which descriptions of lands to be taken were these or equivalent words: "Including all riparian rights and privileges." The award of the commissioners followed the petition in this respect. The condemnation proceedings were carried to a close by the assessment of damages for the taking, and payment thereof. Opposite the land thus taken and involved herein, between the water-line of the bay and the point of navigability, is shallow water for a distance of several hundred feet into the bay. In this space of shallow water, and in front of and about 60 feet from the water-line, the defendant has commenced the construction of a railroad track, driving piles for that purpose. The plaintiffs, claiming through conveyance from the owner at the time the petition for condemnation was filed, bring this action to enjoin the defendant from constructing its railroad in said shallow water. No question is made as to the validity of the condemnation proceedings. A question is made as to their passing to the defendant the riparian rights appurtenant to the land taken, or rather as to their divesting the owner of such rights. It must be apparent that the action must be determined on the right of the plaintiffs. If no right of theirs is invaded or ob-

structed, they have no cause to complain. The question then is, did the owner of the land retain, after its condemnation, the riparian rights appurtenant to it?

One reason urged here why those rights remained in the owner unaffected by the condemnation is that, in describing three tracts, the petition specifies the appurtenant riparian rights as sought to be condemned, while, in describing this particular tract, it is silent as to such rights, and they are consequently excluded from the property to be condemned, and therefore the consideration of the value of those rights was necessarily excluded in awarding compensation for the taking. In this collateral proceeding it must be presumed that the award allowed all the damages that the owner was legally entitled to for taking the tract. The basis for estimating the damages is ordinarily the value of the land taken. If the value be enhanced by advantages it enjoys by reason of its situation, as by abutting on a principal thoroughfare, or on navigable water, no part of the value thus given to it can be excluded in estimating the damages. And it is the same if it be rendered valuable chiefly by having rights appurtenant to it which can only be enjoyed in connection with it. A piece might be taken to which there was no access except by an appurtenant right of way over adjoining lands. The value could not be estimated for the purpose of taking, leaving the right of way out of account. So that, if we are to construe the omission of any mention of riparian rights in the description of this particular tract in the petition as an attempt by the company to exclude such rights from the condemnation, and from consideration in estimating the damages, those rights were still to be considered in estimating the value of the land, and went with it, unless, upon such a condemnation, the riparian rights could be severed from it so that the exclusive right to occupy and use the latter might pass to the company, and the enjoyment of, or right to enjoy, the riparian rights appurtenant to the land might remain in the owner. This question we will consider further on.

Much of the argument in the case was devoted to the question whether, by the condemnation, the company acquired the fee of the land, or only the right to exclusively use and occupy it, the respondent

contending that, in the former case, the riparian rights might go with the land, while, in the latter, they might be severed from the use of the land and remain in the owner of the bare fee. In view of the character of riparian rights, it is immaterial whether the company got the fee or only the exclusive right to use the land. They do not constitute an independent estate. They exist only as incident to the abutting land. They pertain to the use of the land in connection with the water, or of the water in connection with the land, and they cannot be severed so as to be rights in gross, not appurtenant to any land in connection with which they may be used and enjoyed. *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, (38 N. W. Rep. 200.) They consist mainly of the right to enjoy free communication between the shore and the navigable waters of the lake or stream, and for that purpose to build and maintain suitable landings, piers, and wharves in front of the land out to the point of navigability, and to that extent to exclusively occupy, for such and like purposes, the bed of the lake or stream, subordinate to the public paramount right of navigation. For the reason that such rights cannot be severed from the shore, a deed by the owner of the shore, in terms conveying the soil under the water,—but not conveying the shore land,—was, in the case cited, held inoperative to affect riparian rights. For the same reason a reservation of those rights in a conveyance of the abutting land would be ineffectual. The right existing for the benefit of the abutting land, to render its use more available in connection with navigation, it would seem to follow necessarily that one who has the exclusive right to occupy and use the shore as a means of access to the water is entitled to enjoy the riparian rights incident to its situation. If this were not so, then there might be presented the case of an existing right of use in the shallow water, and in the soil under it, while no one was entitled to the actual enjoyment of it. For, as the right of using must be exercised and enjoyed in connection with the use of the land to which it is incident, the owner of the fee of the shore land, if he had no right to go upon nor use the land for passing to and from the water, or any other purpose, could not, of course, exercise the incident right; and, unless the person having the exclusive right to use the land could also exercise and enjoy the incident

right, then no one could. The case of *Brisbine v. St. Paul & Sioux City R. Co.*, 23 Minn. 114, differs from this in the particular just mentioned. That was a case of a public street running along the bank of the Mississippi river. By the dedication, (or condemnation, if the street is established in that way,) the public acquire the right to use the land only for street purposes, the chief of which is for passage along it. But there remains in the owner—aside from the fee—a right distinct from that of the public,—the right to use the street in connection with his abutting property; especially for ingress and egress to and from it. The public right of use, in the case cited, was not exclusive so as to cut off the plaintiff's communication between the land and the water, and he could therefore use and enjoy the riparian right. We conclude that the defendant, having the exclusive right to possess and use the shore, has also the right to possess and enjoy the riparian rights appurtenant to the shore.

Order reversed.

After the filing of the foregoing opinion a petition for reargument was filed, and was granted July 16, 1889; and the cause was again argued at the October term, 1889.

Ensign, Cash & Williams and *Geo. B. Young*, for appellant.

Wm. W. Billson, for respondents.

DICKINSON, J. After the filing of our decision in this case, (*supra*, p. 104,) a reargument was ordered, upon the application of the respondents; it being considered that great public interests were involved which deserved further consideration by the court, with the aid which further research and argument might afford. The principal question to which such reargument was directed was whether the riparian rights which the owner of land abutting upon navigable waters enjoys in the submerged lands between the outer boundary of his ownership in fee and the point of navigability, may be alienated or be severed from the riparian land, so as to exist as rights or property in gross. In our former decision in this case we declared such rights to be incapable of separate existence, and upon that proposition the decision rested. In the reargument of this question the

principles of the law and the authorities which could be deemed in any way to bear upon it have been exhaustively and ably presented by learned counsel upon both sides, and, although this principle had been understood to have been settled in *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, (38 N. W. Rep. 200,) we have, in view of the importance of the subject, entered into a full examination and reconsideration of it. We have been thus led to the conclusion that the proposition that the riparian proprietor's peculiar right of occupancy and use of lands beyond the boundary of his ownership in fee is inalienable and incapable of existence, apart from the right of occupancy and use of the adjacent bank, should not be adhered to. While our former decisions were deemed to be in strict accordance with legal principles, and to follow logically from the fact that the riparian rights came into existence as incidents of the proprietorship of the adjacent shore, we are satisfied that we did not sufficiently consider, in their bearing upon the question, the peculiar nature, extent, and relation of the private and public rights, respectively, in the lands lying between the boundary of the riparian owner's fee and the point of navigability, and that undue importance was given to the fact that these riparian rights have their origin in the relation of the riparian lands to the water, and are properly incident or appurtenant to the riparian lands.

As we proceed now to notice the nature and extent of certain rights growing out of riparian proprietorship, we desire that attention should be given to the facts that those rights partake largely of the ordinary qualities of private property, which is in general divisible and transferable by the proprietor; that they are recognized as valuable property rights in the law; that they are of such a nature that they may be enjoyed separate from the adjacent land to which they were originally appurtenant; and to the absence of substantial reasons, so far as the nature of these rights are concerned, why they may not exist independently of the adjacent riparian estate. We do not affirm that all riparian rights are thus severable. Some, from the very nature of things, may be incapable of separate existence.

In this state the title of the proprietor of lands abutting upon navigable waters extends to low-water mark; the bed of the stream or

body of water, below low-water mark, being held by the state, not in the sense of ordinary absolute proprietorship, but in its sovereign governmental capacity, for common public use. *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, (17 N. W. Rep. 626,) and cases cited. The estate or interest of the riparian owner in the bed of the stream above low-water mark is subject to the right of the public to use the same for the purposes of navigation; but, restricted only by that paramount public right, the riparian owner enjoys valuable proprietary privileges, among which we shall consider particularly the right to the use of the land itself for private purposes. A considerable extent of the shores, not only along tide-waters of the ocean coasts, but on our great inland waters, are of such a nature, out to and even beyond low-water mark, as to be in general unavailable by the public for the purposes of navigation, and must remain forever waste and useless lands, unless reclaimed by artificial means from the shallow water covering them, or unless otherwise improved. It is established beyond question in this state, and in other states as well, that the proprietor of the riparian lands may make such improvements. Subject only to the limitation that he shall not interfere with the public right of navigation, he has the unquestionable and *exclusive* right to construct and maintain suitable landings, piers, and wharves into the water, and up to the point of navigability, for his own private use and benefit. *Rippe v. Chicago, D. & M. R. Co.*, 23 Minn. 18; *Brisbine v. St. Paul & Sioux City R. Co.*, Id. 114; *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, (2 N. W. Rep. 842;) *State v. Minneapolis Mill Co.*, 26 Minn. 229, (2 N. W. Rep. 839;) *Carli v. Stillwater Street Ry., etc., Co.*, 28 Minn. 373, (10 N. W. Rep. 205;) *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, (17 N. W. Rep. 626;) *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, (38 N. W. Rep. 200;) *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, 10 Wall. 497. And it is obviously immaterial, if the public interests be not prejudiced, whether the submerged land be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed. *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, (17 N. W. Rep. 626;) *Clement v. Burns*,

43 N. H. 609; *Bell v. Gough*, 28 N. J. Law, 624; *Providence Steam-Engine Co. v. Providence & S. Steamship Co.*, 12 R. I. 348, 363. As the right of private use and enjoyment of the improved or reclaimed premises will continue so long, at least, as it does not interfere with the limited and defined public interests, it is obvious that, in general, it may continue forever.

This private right of use and enjoyment is not, we think, limited to purposes connected with the actual use of the navigable water, but may extend to any purpose not inconsistent with the public right. *Rippe v. Chicago, D. & M. R. Co.*, 23 Minn. 18; *Brisbine v. St. Paul & Sioux City R. Co.*, Id. 114; *Parker v. West Coast Packing Co.*, 17 Or. 510, (21 Pac. Rep. 822.) As was said in *Morrill v. St. Anthony Falls Water-Power Co.*, 26 Minn. 222, 228, (2 N. W. Rep. 842,) referring to the decision in *Dutton v. Strong*, 1 Black, 23: "The right to encroach upon the shallow water of the lake, by an exclusive appropriation even of the underlying soil, must rest upon the proposition that the riparian owner may make any use of the lake or river opposite his land not inconsistent with the public right." The following language of the *Morrill Case*, just cited, although used with reference to the riparian right to use the water of a navigable stream, is applicable here: "The limit to the private right is imposed by the public right, and the private right exists up to the point beyond which it would be inconsistent with the public right." No one but the riparian proprietor has the right to improve and occupy such premises for private purposes, and it does not concern other persons how or for what particular purposes the reclaimed lands may be used, so long as there is no violation of the maxim, *sic utere tuo ut alienum non laedas*. It is for the interest of the state that such lands, not available for the public purposes for which alone the state exercises authority over them, shall be improved and used for profitable enterprises, rather than that they lie forever waste and unproductive. And the state, while recognizing the ancient riparian right of occupancy, has not assumed to prescribe or to limit the purposes or manner of its enjoyment. That seems to have always been left to the discretion of the person in whom the right is exclusive, and the decided

cases afford many illustrations of uses in no way connected with the purposes of navigation.

This right of the riparian proprietor, even before it has been in any manner exercised by reclaiming or improving the premises,—the right itself to reclaim, improve, or occupy,—is a *property* right, vested in him, recognized and protected in the law as property. He cannot be deprived of it without due process of law. It cannot be taken from him, and devoted to public use, without compensation. *Brisbine v. St. Paul & Sioux City R. Co.*, 23 Minn. 114; *Carli v. Stillwater Street Ry., etc., Co.*, 28 Minn. 373, (10 N. W. Rep. 205;) *Union Depot, etc., Co. v. Brunswick*, 31 Minn. 297, (17 N. W. Rep. 626;) *Yates v. Milwaukee*, 10 Wall. 497; *Bell v. Gough*, 23 N. J. Law, 624; *Delaplaine v. Chicago & N. W. Ry. Co.*, 42 Wis. 214; *Lyon v. Fishmongers' Co.*, L. R. 1 App. 662. Such property is subject to the law of eminent domain. A railroad company, locating its line of road over such submerged lands, might acquire, by condemnation proceedings and the payment of compensation, the necessary right of way, divesting the riparian owner of so much of his property. But cannot the riparian proprietor voluntarily convey, for an agreed compensation, what the company could thus take from him by legal proceedings *in invitum*? If he were to convey by deed the right to occupy exclusively for railroad purposes the premises in front of the riparian lands, would not the company acquire a right to occupy and enjoy the use of the premises, although it took no interest in the upland estate?

These peculiar property rights of the riparian owner may constitute, estimated in connection with the riparian land, the chief value of the premises. It may even be that the whole value of such real property consists in the right to improve and occupy the submerged lands for private purposes. The extent of the riparian right in this respect is not measured by the value of the upland, nor by the distance to which the owner's estate may extend inland from the shore. The barest strip of upland, though wholly valueless and useless in itself, justifies the owner in the exercise and enjoyment of the privileges of riparian proprietorship to the fullest extent.

If it be true, as we have said, that the riparian proprietor may improve and occupy such premises in any manner not inconsistent with the public rights, it follows that, although the origin of this peculiar private right is referable to an adjacent riparian estate to which it was originally incident or appurtenant, still its nature and qualities are not in themselves such as to forbid its alienation, its separation from the riparian estate, and its enjoyment by others than the occupants of the upland. Its enjoyment need not be in aid of or associated with the use to which the upland is devoted, or for the benefit of the upland as such. Thus it is supposed that one acquiring a mere right of way for the purpose of access over the upland to the shore may acquire the riparian owner's right to occupy and improve the waste land beyond. *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199. The upland may be used, and be useful, only for purposes to which the use of the adjacent submerged lands, even after reclamation, would be in no manner accessory. The upland may be owned and used exclusively for the purposes of a residence, a church, a hospital, a bank, or for any purpose wholly unconnected with the advantages incident to the adjacency of navigable water, or of the intervening waste land; and yet the proprietor might undoubtedly erect a wharf, or fill in solid earth, and allow others to use the wharf or reclaimed land. Nor would his right to allow others to use the wharf or made land, or the right of others to use it with his consent, depend upon there being also a license of access to such premises over the abutting upland. We suppose that the land-owner might grant to one having no riparian possession in the vicinity the right to use his wharf, or the improved or reclaimed shore-lands, for any purpose, whether connected with navigation or not, just as the owner himself might do. No individual whose rights were not prejudiced could complain; and so long as the public rights are not interfered with, the state is not interested to oppose such use, but rather is interested to encourage and sanction it, without regard to the fact whether or not the use be associated with the use of the upland.

It has been suggested in some cases that even though such rights cannot be wholly disconnected from riparian lands, and be enjoyed

in gross, yet if the person to whom the rights of the riparian proprietor have been relinquished has access to the premises over the next adjacent estate abutting upon the shore, he may enjoy such rights, although he has no interest in the estate to which they were previously incident, (see *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199;) and this is spoken of as being possible in *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, (38 N. W. Rep. 200.) But this would seem to be inconsistent with the doctrine that such rights are not severable from the riparian estate to which they are by nature appurtenant. The whole reason supporting that doctrine is the technical reason that the rights are merely incident and appurtenant to the abutting riparian land. They were not originally incident to other estates than those adjacent to and in front of which only these privileges might be exercised. The owner of a riparian estate had no peculiar privileges in the submerged land lying in front of the next adjacent estate. If it be conceded that these rights may be separated from the parent estate, and be enjoyed by the owner of the next estate abutting upon the shore, there is no room for further contention. If such separation is possible, it matters not whether the means of access and opportunities for enjoyment be through the next estate abutting upon the shore, or the next, or by means of a public highway leading to or past the premises in question, or by the navigable water, or in any other manner. Any person who may acquire from the riparian owner his right to improve and occupy such premises may always have access to them by means of the navigable water,—a common highway. He may acquire other means of access. We think that there is nothing in the matter of *access* which forbids the existence of these rights separate from the abutting estate.

In some jurisdictions it is considered that the adjacent riparian owner actually acquires title to the lands improved and reclaimed from the water, although the title was before in the state in actual proprietorship, (as in New Jersey;) and that he may then convey the reclaimed premises to persons having no interest in the upland. See *New Jersey Zinc & Iron Co. v. Morris Canal Co.*, 44 N. J. Eq. 398, (15 Atl. Rep. 227;) *Bell v. Gough*, 23 N. J. Law, 624; *Goodsell v. Lawson*, 42 Md. 348, 362; *Nichols v. Lewis*, 15 Conn. 137; *Clement*

v. Burns, 43 N. H. 609. We do not wish to be understood as assenting to the proposition that the title of the state may be thus transferred by acts of the riparian proprietor which the state has no particular reason at the time for opposing. It may be doubtful whether the title does not remain unchanged, and whether if, in the future, it should become necessary for the state to broaden the navigable channel so as to embrace the reclaimed land, it would not have the right to do so. However that may be, we deem these decisions to lend some support to the doctrine that the riparian right to fill and reclaim and use the submerged lands for his own private purposes is not necessarily so annexed to his proprietorship of the upland that it cannot be severed. If the right to occupy and use the premises is transferable *after* they have been improved by the exercise of the legal rights of the riparian proprietor, we see no sufficient reason why his legal right to improve and occupy and use the premises should not also be transferable. If it be said that in the one case he has the legal title, and in the other he only has the valuable right of occupancy and improvement, with the power thereby to acquire the legal title, it may be answered that such rights are themselves ordinarily a proper subject of transfer.

It is remarkable that so few authorities are to be found directly deciding the question of the severability of such riparian rights. The question was directly decided in *Simons v. French*, 25 Conn. 346, it being held that the right of the riparian proprietor to wharf out to navigable water, over the flats, (the fee of which was in the state for the purposes of navigation,) was not inseparably incident to the upland estate, but was subject to conveyance or reservation by itself. It is claimed that *Simons v. French* was overruled or modified in *New Haven Steamboat Co. v. Sargent*, 50 Conn. 199. We do not understand the latter decision to have such an effect. The court was careful to declare that its decision was based upon the peculiar circumstances of that case, and, while there is language suggesting a doubt as to *Simons v. French*, in other parts of the opinion the essential doctrine of that case seems to be reaffirmed. To the same effect as *Simons v. French* is *Parker v. West Coast Packing Co.*, 17 Or. 510, (21 Pac. Rep. 822.) In *Yates v. Milwaukee*, 10 Wall. 497, the

owner of a lot on a navigable river, (Shepardson,) who had begun to build a wharf in front of it into the river, conveyed to Yates the interest he had in the wharf and in front of the lot to the centre of the river, with the right of docking out and making a water front on the river. Yates built the wharf. His right to maintain it came in question in this action against the city. His right was sustained, although without any discussion of the question of severability. The court said: "We are of opinion that Shepardson, as riparian owner of a lot bounded by a navigable stream, had a right to erect this wharf, and Yates, the appellant, whether he be regarded as purchaser or as licensee, has the same right." The court seems to have regarded it as immaterial whether Yates's grantor owned the fee beyond the shore line or not. It would seem that Yates had probably a way of access to the premises covered by the wharf by means of a street leading down past the lot to the water, but we do not regard this as of controlling importance. See, also, *Bowman v. Wathen*, 2 McLean, 376. In Massachusetts the fee of the riparian owner extends to low-water mark, not exceeding 100 rods beyond high-water mark; but it is held subject to the general public right of navigation, until the premises shall have been so improved as to exclude the public use. *Com. v. Alger*, 7 Cush. 53. And so in Maine. It would seem that the real beneficial interest which the riparian owner enjoys in such premises in those states does not greatly differ from the rights of riparian owners in this state. But it is there held that he may convey his upland without the submerged lands, or the latter without the former. *Storer v. Freeman*, 6 Mass. 435; *Barker v. Bates*, 13 Pick. 255; *Deering v. Long Wharf*, 25 Me. 51. These authorities may be regarded, at least, as supporting the proposition that there is nothing in the essential nature of the riparian owner's right to improve and occupy such premises which forbids its separation from the riparian estate.

We have thus considered that the riparian proprietor has the exclusive right—absolute as respects every one but the state, and limited only by the public interests of the state for purposes connected with navigation—to improve, reclaim, and occupy the submerged land, out to the point of navigability, for any private purpose, as he

might do if it were his separate estate; that this *right*, even though it may never have been exercised, is recognized and protected by the law as *property*, of which he cannot be deprived even by the state without just compensation; that the enjoyment of the right—the use of the premises—need not be associated with the use of the upland; that it is for the interest of the state that such waste lands be improved and rendered profitable, while the state is not concerned as to whether the owner of the adjacent upland, or some person to whom he may release his right, make the improvement and enjoy the private benefit; that the rights of other persons are not involved in the question; that when the land has been reclaimed it may be conveyed, according to most of the authorities, apart from the original upland; and that, according to other authorities, the riparian right may be transferred to and enjoyed by the owner of the next adjacent riparian estate. From these considerations, as well as from the authorities cited bearing directly upon the question, we think that the quality of alienability should be deemed to belong to this kind of property, as it does to property in general. See opinion of Bramwell, B., in *Nuttall v. Bracewell*, L. R. 2 Exch. 1, 11. The only reason opposed to this is the technical one that the right grows out of, and, until severed, is incident to, a riparian estate. We have come to feel that this is unsatisfactory as a reason why such property should be deemed inseparable from the parent estate, and incapable of a separate existence. If the right in question were created out of, or enjoyed at the expense of, some other estate or property, and were measured and limited by the needs or use peculiar to the riparian estate to which it is annexed, there would be ground for others to urge that the right could not be changed or transferred so as to enlarge the scope of a grant or contract, or so as to prejudice the party complaining. But no such conditions exist. The rights of no one are affected by allowing the riparian owner to convey away this part of his property as he may his other property. It is only an abstract question whether the right, originating in custom, and having originally attached as an incident to his riparian lands, may now be sold and conveyed, and be enjoyed by the purchaser. It is for the inter-

est of the riparian owner that he be allowed to dispose of or use his private property at his own discretion. It is for the interest of the public that such property be subject to purchase and use, where the owner may be incapable of improving it. No one is interested in opposing such unrestricted alienability and use.

Although we have become convinced that the better reason is opposed to our former decision upon this point in *Lake Superior Land Co. v. Emerson*, 38 Minn. 406, (38 N. W. Rep. 200,) we should have deemed it better that a rule of property, although so recently declared, should not be disturbed, were it not that it is supposed that the result of that decision, if adhered to, would be very seriously prejudicial to the tenure of a large amount of very valuable property, which for a long time has been deemed and treated as alienable and enjoyable apart from the riparian lands, and which, according to our present opinion, was rightfully so treated prior to our decision in the *Emerson Case*. The case before us shows that in front of the riparian land described in the complaint the reclaimable submerged land extends into the Bay of St. Louis about 850 feet to a dock line legally established under the authority of the state, (subsequent, however, to the condemnation by the railroad company;) and this condition of things is understood to be very general along the shores of the navigable waters about Duluth. Such lands have been platted and sold to various persons, and have been to a considerable extent improved, and, so far as the state is concerned, have practically become private property. No one but the owners of the original riparian estate can question the rights of the purchasers; and in the case of *Miller v. Mendenhall*, *supra*, p. 95, which was submitted and is decided in connection with this case, we hold that, notwithstanding the decision in the *Emerson Case*, a grantor may be estopped by his covenants from disputing the title of his grantee in respect to such lands. We think that we ought to go further, and hold that the riparian right to improve, reclaim, and occupy such premises is transferable.

As we reverse our former decision upon this point, upon which alone this case was determined at the former hearing, it becomes necessary to consider whether, upon other grounds, the condemna-

tion proceedings had the effect to vest in the railroad corporation the right to use and occupy for its proper purposes the submerged land beyond the shore.

We deem it unnecessary to decide whether the interest appropriated by the condemnation proceedings was the whole estate in fee-simple, or only an easement. We will assume that it was only an easement. The corporation acquired the right to the exclusive and perpetual use, for railroad purposes, of the premises which were the subject of the proceedings. Until in some manner the riparian rights should be severed from the riparian estate, they would remain properly incident and appurtenant thereto. They would pass by a conveyance of the upland, as being appurtenant, although not specifically designated in the deed. So they would be embraced in a lease of the riparian estate. As in the case of alluvial formations along the shore, the person entitled to the exclusive possession and enjoyment of the riparian land would be also entitled to the benefits legally incident thereto. If in the condemnation proceedings the land appropriated be described in terms fitly designating merely the riparian estate, that would be deemed to include the rights incident to that estate, unless, at least, the terms of description were such as to indicate a contrary intention,—an intention to separate the incidental rights from the principal estate,—or unless in some other manner such intention were made manifest. In proceedings for the taking of the riparian estate, the title of which extends to low-water mark, and from which the rights incident to riparian proprietorship had not been in any manner severed, it is to be presumed, in the absence of anything showing a different intention, that the latter were included. Whether, in such proceedings, (the land-owner not consenting to a separation of his riparian rights from the principal estate,) a corporation would have the power to appropriate to its use the upland estate merely, neither making compensation for nor assuming to acquire the riparian rights incident thereto, we do not determine.

The condemnation proceedings in question embraced 35 distinct tracts of land. These were separately designated in the petition, the several parcels being numbered consecutively from number one up-

wards, the tract in question being the sixth. The land was described by metes and bounds on the landward sides, no line along the shore or water side being given. The last of the lines given is described as extending "into the Bay of St. Louis," the description concluding, "including all the premises between the lines so described and the said Bay of St. Louis." The award of commissioners describes the premises appropriated in the same manner. In the same petition, and in respect to the parcels of land numbered 1, 3, and 5, there were added to the specific descriptions of land the words, "including all riparian rights and privileges," or words of similar import; and it is contended that from the express including of such rights as to such parcels, and from the absence of any reference to riparian rights in respect to the tract in question, it is apparent that it was not intended to embrace them in the condemnation of this land. We think that the conclusion is not justified by this circumstance. While there was but one petition for the appointment of commissioners, the proceeding relates to several parcels of land belonging to different persons, and which in the petition are treated as entirely distinct. The legal effect, as respects the construction of these several descriptions, is not different from what it would have been if separate petitions had been made as to each of the several tracts. In such a case the owner of one of the parcels would not be justified in claiming that the express mention of riparian rights in the petition as to other lands should be deemed to change or modify the natural construction of the terms employed to designate his land, there being no express mention of riparian rights in connection with the latter. There may have been peculiar reasons for the express mention of riparian rights in connection with the other lands embraced in the petition now before us. The relation of those descriptions to that in question is too remote to safely admit the language, adopted with reference to the former alone, to qualify or affect the terms selected for the special purpose of describing the latter particular tract. For these reasons it is considered that the result expressed in our former decision in this case was right, and should not be changed, and the order appealed from is reversed.

ANNA MICHAELIS vs. FRED MICHAELIS.

April 3, 1890.

U. S. Homestead—Rights of Deserted Wife in Possession.—A deserted wife, left in possession of a homestead, and recognized by the land department as having a right to contest the entry thereof by a subsequent claimant with notice, will be protected in her possession pending such contest, and may recover damages against such claimant for his wrongful acts in dispossessing her, and removing and destroying the improvements left in her possession; and she may in such case recover punitive damages if such acts are wilful and malicious, or accompanied with circumstances of aggravation.

Same—Relinquishment by Husband Alone.—The laws of the state in relation to conveyances of exempt homesteads do not apply to the relinquishment of homestead entries of United States lands.

Certain exceptions to the reception of evidence and to the charge of the court sustained.

Appeal by defendant from an order of the district court for Sibley county, *Edson, J.*, presiding, refusing a new trial after verdict of \$475 for plaintiff.

R. H. McClelland, for appellant.

W. H. Leeman, for respondent.

VANDEBURGH, J. Upon the 15th day of June, 1887, the plaintiff married August Michaelis, and went to reside with him upon his homestead claim in Sibley county, which he had already entered at the United States land-office, being the premises in question. The improvements thereon, consisting of a house, granary, and stable, he had previously purchased of a former occupant. Upon the 4th day of May, 1888, he filed his relinquishment, which was entered at the land-office; and he thereupon, as the evidence tends to show, made a formal sale of his improvements to one Rosser, for the alleged consideration of \$300, (which the latter never paid,) but who, as it is claimed, soon after transferred the same to the defendant, who is the brother of August, and who claims to have paid therefor the sum agreed to have been paid by Rosser to defendant's father, and after-

wards, on the 22d day of June, 1888, was permitted to enter the same as a timber claim under the timber-culture act, and the usual certificate was issued to him. Plaintiff's husband, August Michaelis, upon relinquishing his homestead, abandoned the same, leaving his wife and child in possession thereof; and the evidence tends to show that he wilfully deserted and abandoned his family at that date, and that plaintiff insisted upon retaining the possession of the premises under the homestead act.

In view of the beneficent purpose of the homestead law to provide families with homes upon the public lands, the department, in administering it, have ruled that a deserted wife is to be treated as the head of a family, and, if she retains the possession of the land entered by the husband, she may continue to reside thereon, and may make final proof in his name, or make an entry thereof in her own name, upon proof of the fact of her husband's desertion. 2 Land Dec. Dep. Int. 81; 9 Land Dec. Dep. Int. 186. And this right of the deserted wife the department will respect, and will not permit to be defeated by a fraudulent and collusive relinquishment by the husband, in hostility to her rights. 14 Copp, Land-Owner, 258. Nor will absence from the premises, for periods not unreasonable, caused by sickness or poverty, be deemed sufficient to cause a forfeiture of her homestead rights. The evidence tends to show the plaintiff's rightful possession and occupancy of the land within the recognized rules and practice of the land department, and that the relinquishment of the homestead and the sale of the improvements to the defendant were fraudulent and collusive as against plaintiff. But her title must depend upon the result of the contest with the defendant before the land department, resulting from his application to enter the same land as a timber claim. That determination may be made upon issues and evidence of such a nature that it will necessarily be final, and not subject to be reviewed by the courts, or, if subject to be reviewed, they will not take cognizance of the case while pending before the department. *Corbett v. Wood*, 32 Minn. 509, (21 N. W. Rep. 734;) *Empey v. Plugert*, 64 Wis. 603, (25 N. W. Rep. 560.) But in the mean time the law will protect her in her possession and property, and restore it if forcibly taken from

her, and will interfere to punish trespassers who seek to turn her out of possession by force or violence. Gen. St. 1878, c. 85, § 1; *Ather-ton v. Fowler*, 96 U. S. 513. It is also claimed by the plaintiff that the department has expressly recognized her right to make such contest, but the record does not disclose any evidence of such action, though it appears to be fully warranted, under the regulations of the land department which we have referred to, and her right to contest the defendant's entry must be recognized.

Defendant knew that the plaintiff was in possession and claimed to be entitled to the homestead with the improvements, and knew that his brother had left her. He was entitled to contest her right to it, in the proper tribunal; but while the contest was pending he had no right, with force and strong hand, to dispossess the plaintiff, or destroy the tenements occupied by her. She being in the peaceable possession, and his claim not yet shown to have been determined to be superior, hers must be deemed the better right; and, if the jury believed the testimony in her behalf, they were warranted in awarding her the amount of damages actually done to the premises and suffered by her; and if the trespass was malicious, and accompanied with circumstances of aggravation, they might add punitive damages, but not unreasonable or disproportionate to the nature of the injury. The complaint was sufficient. It alleges plaintiff's title and ownership and peaceable possession, defendant's wrongful entry and trespasses, and the nature and extent of her damages. This was all that was necessary, under the statute. Upon the evidence in the case, she has a standing before the department to make her contest, and if she prevails she will retain the improvements abandoned by her husband; and if this be so, defendant was clearly a wrong-doer, and there is no legal justification for his conduct. He appears also to have been assisted by the plaintiff's husband and Rosser, and it would seem to have been a concerted effort on their part to drive her from the premises. The evidence also tends to prove that the husband did not let her know of his purpose to relinquish his homestead entry; but defendant knew of his intentions, and Rosser, who lived with them be-

fore August left, and who knew the facts, admits that he sold to defendant because he was afraid of a contest with plaintiff.

But there were some errors in law occurring at the trial, for which a new trial ought to have been granted. It was error, as against the objection of the defendant, to allow evidence of the fact that the plaintiff had given her husband all her money the winter before he left her. This was irrelevant, and presumptively prejudicial. The court was not asked to lay down the correct rule for the allowance of punitive damages. The defendant cannot complain of the omission so to do, but it was error for the court to intimate to the jury that the plaintiff was entitled to special or punitive damages, in excess of the value of the property destroyed by a simple trespass, because it would cost more to build them new than they were worth. It was also error to charge that a government homestead could not be relinquished without the written consent of the wife. The state law has no application in such cases.

Order reversed.

CYRUS E. BROWN *vs.* IDA J. STILLMAN.

April 8, 1890.

Conveyance of Mortgaged Land—First Mortgage Assumed by Grantee—Second Agreed to be Paid by Grantor.—A mortgaged a certain lot to B, and then conveyed the same to C, subject to the mortgage, without any assumption clause in the deed. C thereupon conveyed to D, subject to the same and a second mortgage, by warranty deed, and thereby also expressly agreed to pay and discharge the second mortgage, his grantee assuming the first mortgage. *Held*, that the land passed to D charged with the incumbrance of the mortgage made by A, as the primary fund for its payment, but that, C not being personally liable to pay the same, the covenants in the deed between him and his grantee must be construed as mutual covenants of indemnity as respects the incumbrances upon the land, and did not make D personally liable, legally or equitably, to B, the first mortgagee, as principal debtor or otherwise.

43	128
47	106
43	128
53	452

Plaintiff having paid the amount of the interest coupon note due March 1, 1888, and secured by mortgage made by plaintiff March 1, 1887, being the first of the mortgages mentioned in the opinion, brought this action in the district court for Hennepin county, to recover from defendant the amount so paid with interest. The action was tried by *Rea, J.*, who ordered judgment for plaintiff. The defendant appeals from an order refusing a new trial.

R. L. Stillman, for appellant.

Woods & Kingman and Edward C. Gale, for respondent.

VANDERBURGH, J. The plaintiff, on the 1st day of March, 1887, owned the certain town lot described in the complaint, and on that day executed a mortgage thereon to secure a certain negotiable note, with interest. A few days later the plaintiff sold and conveyed the mortgaged premises by warranty deed to one Darrow, subject to the mortgage, and thereafter, in May, 1887, Darrow conveyed the same premises by warranty deed to a corporation known as the "Barber Supply & Exchange Company," also subject to the mortgage; and, lastly, on the 3d day of September, the Barber Supply & Exchange Company sold and conveyed the same land to the defendant in this action. The mortgage was to run three years, and the first instalment of interest became due March 3, 1888, being a negotiable coupon interest note. There were no covenants by the grantees in the deeds to Darrow and the Barber Supply Company, respectively, to assume and pay the mortgage, but each took the land subject thereto. But the deed to the defendant contained the following provision and stipulation in respect to that mortgage and a second mortgage therein referred to, viz.: "Subject, nevertheless, to two certain mortgages,—one first mortgage, given to secure the payment of the sum of three thousand (\$3,000) dollars, which said second party [defendant] assumes; and one certain second mortgage, upon which there is remaining unpaid the sum of two thousand five hundred dollars, (\$2,500,) which said first party agrees to pay and satisfy on or before the 3d day of March, 1888."

The first coupon interest note, amounting to \$221.94, was paid by the plaintiff as maker of the original note and mortgage, after maturity; and he now brings this action to recover of the defendant the

amount so paid, on the ground that, by virtue of the stipulation in the deed above quoted, the defendant became personally and primarily liable to pay the debt secured by the mortgage. To this legal proposition we are unable to give our assent. In construing this clause, and in endeavoring to ascertain the intention of the parties, we must consider their relations to the land conveyed, and to the original mortgage thereon. As above stated, in the prior deeds referred to, the land was conveyed simply "subject" to the mortgage, without any assumption clause. The effect of the deed from the original grantor to Darrow, then, was to make the land the primary fund for the payment of the mortgage, without any personal liability on the part of the grantee, so that, in case the plaintiff was compelled to pay the mortgage debt, he might be subrogated to the rights of the mortgagee as respects the land. The land thereafter passed to the defendant's grantor charged in like manner with the same liability, such grantor owing no other debt or duty to the mortgagee or the mortgagor, this plaintiff. He conveyed to the defendant by deed of warranty. The land was, it seems, subject to two mortgages; and, if the grantor's liability upon his covenants was to be qualified as respects either, it was necessary that there should be inserted in the deed a suitable stipulation expressing the agreement of the parties as to which he should pay and discharge the land from, and which he should be indemnified against. These are the circumstances under which the contract between these parties is to be construed, and the nature of the defendant's obligation ascertained. As to the second mortgage, it was clearly the intention that the grantor should remain personally liable,—not merely by virtue of his covenants in the deed, but that he should pay it off, and thereby discharge the land therefrom within the time specified. But the first mortgage he was not to become or remain responsible for by reason of his covenants in the deed. As to that incumbrance, the defendant took the land *cum onere*, and charged with it, as the primary fund for its payment; and the clause, "which said second party [defendant] hereby assumes," was merely intended to declare, as between the parties, that the defendant assumed the incumbrance *quoad* the land, so as to indemnify the grantor against his covenants. Since the grantor

was not personally obligated to pay it, it could not be material to him how the mortgage was paid,—whether by foreclosure, or payment by the grantee personally, in case the latter should wish to retain the title. It certainly would not be a reasonable or equitable interpretation of this contract to hold that the parties intended, under such circumstances, to make the grantee (defendant) the principal debtor, and the land simply collateral security to such personal liability. The language must be construed with reference to the nature and purpose of the agreement entered into by the parties.

The assumption clause in this deed, under the circumstances of this case, does not fall within the rule in *Follansbee v. Johnson*, 28 Minn. 311, (9 N. W. Rep. 882,) and similar cases in this court. Here there is nothing to warrant the inference that the contract was made for the benefit of the mortgagee or the plaintiff. He was not put forward as the party to whom the consideration was to be paid, or to receive a part of it reserved in the hands of the grantee for his benefit; nor was there any debt or obligation due from the grantor which the grantee assumed to pay as part of the consideration, and thus made his own debt. *Vrooman v. Turner*, 69 N. Y. 280; *King v. Whiteley*, 10 Paige, 465.

The construction we have given to this clause in the deed in question, is, we believe, in accordance with the great weight of authority, though the courts are not agreed on the question. *Thomas, Mortg.* § 590, and cases; 1 *Jones, Mortg.* §§ 755, 760. Any other rule would, in many cases, work serious injustice.

Order reversed.

v.43m—9

ST. LOUIS DALLES IMPROVEMENT COMPANY *vs.* C. N. NELSON LUMBER
COMPANY.

April 8, 1890.

Boom Company—Special Law held Sufficiently Definite.—The special law authorizing the plaintiff to improve the navigability of a specified part of the St. Louis river, to assume control of logs driven down the river, and to charge specified tolls, *held* not to be so uncertain or indefinite as to be ineffectual.

Same—For what Logs Tolls may be Charged.—*Held*, that the statutory obligation to assume control of, and to drive through the specified limits, "all logs that may be *driven* down" said river, and to charge tolls therefor, is applicable to logs retained in booms above this locality, and not intended to be floated further down the stream, but which accidentally escaped from the boom, and were carried down in a great freshet.

Plaintiff brought this action in the district court for St. Louis county to recover tolls to the amount of \$17,000. The action was tried in Ramsey county, before *Vilas, J.*, who ordered a dismissal at the close of plaintiff's case. After his decease a motion for a new trial was made before *Kelly, J.*, and was denied, and the plaintiff appealed.

J. M. Gilman, H. J. Horn, and W. W. Billson, for appellant.

Warner & Lawrence and White & Reynolds, for respondent.

DICKINSON, J. In June, 1888, the defendant owned a very large quantity of saw-logs, which had been floated down the St. Louis river and within the booms of the Knife Falls Boom Corporation, above Knife Falls, where the defendant intended to retain them to be manufactured into lumber. By reason of a great freshet and an extraordinary high stage of water in the river, the logs were swept out of the boom, and down the stream, to and through that part of the river where the plaintiff had made improvements to overcome the natural obstacles to the floating of logs. The plaintiff claims the right to charge tolls for the logs so carried down through that part of the river where its improvements are situated. This action is for

the recovery of such tolls according to the special law hereafter referred to.

The plaintiff corporation was organized, under the general laws of the state, in 1874. The purpose of its organization, as set forth in its articles of association, was "the building of slack-water navigation upon, and improving the navigability of, the St. Louis river, between, [here follows a designation of a certain part of the stream, embracing some 13 miles of its course,] by blasting rocks, removing obstructions, and building dams and such other structures and works of internal improvement as will facilitate the running of logs, and otherwise improve the said river." Chapter 48 of the Special Laws of 1875, after reciting the formation of this corporation "for the purpose of improving the navigability of the St. Louis river" within the limits specified, enacts, in section 1, that the corporation shall have the term of three years "to finish and perfect its improvement" of the river within those limits, "to make the said river, between the said points, navigable for the purpose of driving and floating down the said river any and all pine saw-logs cut upon the said river above and between the points above mentioned, * * * and for such purpose shall have full power * * * to build and construct dams and wing-dams upon the said river, and by removing obstructions within the bed of said river, and to raise the water upon the said river, and to divert the current thereof." Section 2 provides that at the expiration of the three years specified the corporation "shall take and receive all logs that may be driven down the said St. Louis river" at the upper limit of the section of the stream before designated, "and shall drive the said logs down the said stream until and below" the lower limit of that section of the stream; "but no logs required for manufacturing or other purposes within the points designated shall be subject to the provisions of this act;" it being further provided that as to such logs the owners should give notice to the corporation before they should come within its limits, and should also separate them from other logs in the river. Section 3 allows the plaintiff to receive and collect, "for the services rendered under the provision of section 2 of this act," a specified toll for the logs "so received and driven by the said corporation between the

points aforesaid." By subsequent legislation the rate of toll was modified, and the time for making the improvements was extended. At the close of the plaintiff's case the court dismissed the action. We are to consider whether the plaintiff had shown a right of recovery. It will be convenient to hereafter refer to this part of the stream where the plaintiff's improvements were made as the plaintiff's "limits" or the plaintiff's "territory."

It is claimed on the part of the defendant that what is prescribed to be done by the plaintiff corporation as a condition of its right to charge tolls, is so indefinite and uncertain that the grant is ineffectual. It is to be admitted that the right to charge tolls for the use of the stream could not have been conferred by the legislature, except upon the condition that the plaintiff should make such improvements to facilitate that use as, in the estimation of the legislature, should be a general public benefit, and a proper and adequate consideration for the granting of such right. While it may be true that, from the nature of the case, the legislature could not well determine, and embody in its enactment, precisely what should be done by the corporation, it was possible to make more definite provision upon the subject than was done,—to provide a means for determining what was to be done, and whether it had been done. But, while the law, in the terms which we have recited, may have been one of questionable expediency, it is our duty to give effect to it, if it is reasonably susceptible of a construction which will render its observance and enforcement legally practicable. We think that a definite meaning and effect may be given to it. Obviously the corporation was not intended by this act to be allowed to do as much or as little as it might elect to do for the improvement of the stream, and then to charge tolls, even though the obstructions to navigation should remain practically and substantially as before. Upon such a construction, the act could not be sustained. We think that the law, read in connection with the charter of the corporation, to which it evidently refers, must be regarded as contemplating the making of improvements of the kind specified, to such an extent as to render the stream, within these limits, reasonably navigable for logging purposes. If this were done, since the corporation itself was required to take charge of all logs,

and to conduct them through its limits, it would not so much concern the owners, practically, whether or not everything should be done which might facilitate the management and floating of logs. Of course, the plaintiff accepting its franchise in this form, it was left open to issue and proof as to whether it had complied with the conditions upon which its right to charge tolls must be deemed to rest; for the legislature has not determined it, nor provided any special means for its determination.

There was evidence in the case tending to show that the plaintiff had done what the act of the legislature contemplated, and that the improvements made by the plaintiff had been maintained by it, and were in proper condition to serve the purposes intended, when the logs in question were swept through there, in June, 1868. The decision of the learned judge of the district court, refusing a new trial, was placed upon the ground that, as these logs were not intended by the owners to be floated down this part of the river, and were not "driven" into the plaintiff's limits by any act or with the consent of the owners, but only by accident and by force of the freshet, the statutory right to charge tolls was inapplicable. We have been led to a contrary conclusion, although we recognize the force of the reasons influencing the decision of the court below. We also understand that the right to exact such tolls cannot be recognized as existing unless the intention to grant the right is found expressed in the legislative act, reasonably and fairly construed. The language of the act subjecting to tolls all logs "driven" down the river is susceptible of a broader meaning, as well as of the narrow one signifying a personal control and management of the logs. Indeed, we suppose it to be true that generally, in this mode of transporting logs, on streams of any considerable size, the great mass of the logs is swept down with the current, without any personal control being exerted upon them; and it is suggested by the evidence in this case that the manner of doing such business is to allow the stream to carry down, without personal attendance, all logs that will float to their destination by the unaided action of the water; the drivers then commencing at the upper end of the course, and bestowing such labor as may be necessary to refloat such logs as may have become

stranded on the way. There can be no doubt that in such a case the term "driven," within the meaning of this legislative act, would be applicable to the logs which should come down, *unattended*, in advance of those upon which personal labor had been bestowed in the course of the passage; and, if the stage of water or the course of the stream were such that no such labor should be necessary to keep the logs in the current, the logs sent down in that manner would be deemed to have been "driven" down the stream, within the meaning of the act. Or, if a log-owner should put his logs into the stream, above the limits of the plaintiff's improvements, to be floated down to a point below this territory, but should neglect, or for any cause be prevented from, putting on a force of men to follow them down the stream, the logs thus coming within the limits, and under the care and control, of the plaintiff, and floated down through its territory, would be subject to toll as logs driven down the stream. We consider that the word "driven" should be construed as properly including logs driven only by the unaided action of the stream. This is a proper meaning of the word in our language. See Webster's Dictionary.

That these logs were not originally intended by the owners to go below the Knife Falls boom, a short distance above the plaintiff's limits, and that in this particular case the floating of the logs through these limits may have been of no benefit to the defendant, we do not regard as matters of controlling importance in the construction of the law. The right to charge tolls does not depend upon the improvement or service having been actually beneficial to the owner in the particular instance. *Osborne v. Knife Falls Boom Co.*, 32 Minn. 412, (21 N. W. Rep. 704;) *Osborne v. C. N. Nelson Lumber Co.*, 33 Minn. 285, (22 N. W. Rep. 540;) *Chesley v. De Graff*, 35 Minn. 415, (29 N. W. Rep. 167.) The act to be construed was not adopted with reference to this particular case, but was in the nature of a law to have a general application; and we should read the law with regard to such general considerations as the legislature must have contemplated in adopting it.

Without reference to the evidence in this case showing the serious obstructions existing in the stream at the time this act was passed,

it is to be assumed that the legislature deemed them to be so great as to justify the means adopted, and embodied in this act, to overcome the difficulties, and to make the stream practically useful for floating logs. It is to be assumed, too, that the legislature considered that, even though in some particular cases the improvements and service of the plaintiff might be of no benefit to persons affected by the act, yet that in general the result would be beneficial. It is further to be observed that although one having logs above these limits might desire to retain them there, yet, if they should escape, and be carried into this part of the stream, it might be considered to be for his advantage that they should be carried down to open water below, rather than that they should be obstructed, and perhaps become jammed in an inextricable mass in the chain of natural obstructions in this part of the river. There is, then, nothing in the nature of such cases to render it improbable that the law was intended to have an application so general as to include them. Again, it is to be considered that not only the owners of these logs, but the public, were concerned in the matter under consideration. This stream was a public highway, the general usefulness of which depended upon its being kept free from obstructions; and this may be deemed to have been one of the purposes in view in the adoption of this law. Whether or not it might be for the interest of a particular log-owner that his logs, although carried down the stream by accident, should be allowed to lodge within these limits, and become jammed so as to obstruct the further use of the stream, it was for the general interest of the public that this should not occur. Reading the law in view of these considerations, it would seem that the provision requiring the plaintiff to assume control of all logs driven down the river and into its territory, and to drive them through this section of the stream, should not be construed as being inapplicable to logs coming down under such circumstances as are presented in this case. So far as concerned the public interest, it would be a matter of little moment what might be the wishes of the log-owner in a particular case. Indeed, it would seem, from the terms of the act, that it was not contemplated that in general the plaintiff would be informed concerning the wishes of the owners of logs. Specific pro-

vision is made for notice as to logs which might be desired to be retained *within* these limits for manufacturing or other purposes. No other provision is made respecting notice, and no duty to give notice in general is to be inferred, in view of the explicit provision as to notice in the one case specified. As we have before remarked, those logs in a "drive" which would first come down would ordinarily be unattended by drivers, but would come into these limits, as the logs in question did, floating by the unaided action of the stream. Yet the act requires the plaintiff to assume control of "*all* logs that may be driven down the said St. Louis river," and to drive them through these limits. This is an obligation imposed upon the plaintiff which it cannot neglect to perform without rendering itself liable in damages; at least in the absence of some notice affecting the obligation. Hence, it seems apparent that the law made it practically necessary for the plaintiff to assume the control of, and to drive, all logs found coming down the river, and within its limits. It is not to be supposed that the mere undisclosed desire of the log-owners, under such circumstances, should control the conduct of the plaintiff, or affect its duty as prescribed by statute. Were it not for the use of the word "driven," concerning which we have commented, the terms of the act, and the considerations to which we have referred, would leave no doubt that this prescribed duty of the plaintiff extended to cases like that before us. We do not think that the use of that word justifies a different construction.

Assuming, then, that such was the duty of the plaintiff, it follows that it was entitled to charge toll for these logs. The obligation prescribed in the act, and the compensation allowed, are reciprocal. The one is the consideration for the other.

It does not affect the question before us—the right to recover any tolls—that, as to the logs for which tolls are charged, the plaintiff may have done little or nothing beyond the making and maintaining of its improvements, facilitating the floating of logs.

The force of the considerations to which we have referred may be more apparent if it be supposed that this case were reversed; that when these logs commenced coming down an obstruction had occurred at the head of the mass and within the plaintiff's limits, and that,

the plaintiff doing nothing to prevent such a result, the whole mass had become jammed there so that it became very difficult and expensive to extricate the logs; and that this defendant had brought an action to recover damages for this plaintiff's neglect. It would seem to be insufficient to plead in defence that the logs had not been driven down by the owners, but, escaping by accident from their control, had been swept down by the force of the current alone. That would seem to confine to too narrow a limit the statutory duty of the improvement company.

Order reversed.

BEULAH M. LANE vs. ROBERT S. INNES and others.

April 9, 1890.

43	137
46	177
47	588
43	137
65	332

Jurisdiction—Hennepin County Common Pleas.—By the act creating the court of common pleas of Hennepin county, (Sp. Laws 1872, c. 177,) that court was given equal and concurrent jurisdiction with the district court in that county, and the same statutory procedure was applicable alike to each.

Bankruptcy—Fraudulent Conveyance—Action in State Court by Assignee.—An assignee in bankruptcy, under the general bankrupt act of 1867, was entitled to bring an action in the state courts to set aside fraudulent conveyances made by the bankrupt. Such an action involves no federal question. It is in the nature of an action *in rem*, and its object is to reach the property fraudulently disposed of, and apply it to the satisfaction of the debts of the bankrupt, and properly belongs to that class of actions in which service by publication may be made upon non-resident defendants.

Same—Finding that Deed was Delivered after Assignment.—A finding by the trial court, in such an action, that a deed executed by an insolvent, when in failing circumstances, to a non-resident grantee, was not in fact delivered till more than a year after its execution, and a long time after its record, and after the assignment in bankruptcy, is sufficient, as against an attack in an independent proceeding, to support a judgment setting aside the deed as fraudulent and void.

Publication of Summons—Misnomer of Defendant.—A slight variance in the spelling and pronunciation of the name of the defendant in a published summons held not to be misleading, and not fatal to the jurisdiction of the court.

Same—Affidavit of Publication.—An affidavit of publication which states that the summons was published “seven” weeks, once a week, the date of the first and last publication being shown, from which it appears that six weeks was intended, is sufficient, under the statute.

Same—Defect in Form of Summons not Jurisdictional.—Where the summons, as published, contains the requisites of process to bring the party into court, formal defects therein will not prevent jurisdiction attaching, any more than in cases of personal service, if publication thereof is shown by the record to have been authorized, and to have been made and completed in conformity with the statute.

Action brought in the district court for Hennepin county, to determine adverse claims to block 18, in Groveland addition to Minneapolis. Both parties claimed title through Joseph Hodges, the plaintiff (whose name in 1873–6 was Beulah M. Plimpton) under a deed from him, bearing date May 25, 1873; and the defendant Caroline A. Remington under a deed from Hodges's assignee in bankruptcy, made after judgment rendered in his favor in an action in the court of common pleas of Hennepin county, adjudging a deed to “Berlah M. Plimpton” to be void, and barring her from asserting any title to the land in question. The action was tried by *Smith, J.*, who ordered judgment for defendant Remington. The plaintiff appeals from an order refusing a new trial.

F. C. Stevens, Cobb & Wheelwright, and A. J. Shores, for appellant.

Hawley & Hall and Charles H. Woods, for respondent.

VANDERBURGH, J. On the 13th day of February, 1874, one Joseph Hodges, an insolvent, filed his petition in bankruptcy and was duly adjudged a bankrupt by the district court of the United States for the district of Minnesota, and such proceedings were thereupon had in that court that one William E. Hale was duly appointed the assignee of the bankrupt, and the register in bankruptcy, on the 15th day of June, 1874, conveyed and transferred to him all the property, real and personal, that the bankrupt was owner of, or in any way entitled to, on the day his petition was filed; and the deed of assignment was duly recorded. On the 1st day of December, 1873, the bankrupt had filed with the register of deeds of Hennepin county a deed of the premises in controversy here, duly executed in form, by

himself and wife, to the plaintiff herein, a relative of his wife, bearing date May 25, 1873, in which the consideration expressed was the sum of one dollar; and such deed was thereupon duly recorded. It is admitted that the title was in the grantor, Hodges, at and prior to the date of the deed. The plaintiff herein, grantee in such deed, was then, and has since continued to be, a non-resident of the state of Minnesota. On the 15th day of August, 1874, Hale, the assignee, commenced an action in the court of common pleas in and for the county of Hennepin, against this plaintiff, for the purpose of setting aside the deed we have referred to, and having it adjudged fraudulent and void as against the assignee claiming title to the property in question in trust for the creditors of the bankrupt; and, among other things, it was alleged and charged in the complaint that the deed was never delivered to the grantee, defendant, until long after it was recorded; that it was made by Hodges in contemplation of his bankruptcy, and when he was insolvent, and was made and accepted with a view to prevent the property in question from coming to the assignee in bankruptcy, and to prevent the same from being distributed in accordance with the bankrupt act; and for the purpose, and with the intent, of hindering, delaying, and defrauding the creditors of the bankrupt of their lawful claims; and that he was at the date he was so adjudged bankrupt, and long prior thereto had been, the owner of the property, and that by virtue of the assignment it had passed to the assignee, the plaintiff in that action. Such proceedings were thereafter had in that action that on the 30th day of June, 1876, a judgment was duly rendered therein in favor of the plaintiff, as assignee, against the defendant, (plaintiff here,) wherein and whereby it was adjudged that the deed from Joseph Hodges to this plaintiff, before referred to, of the premises in question, "be, and the same is hereby, vacated and set aside, and declared to be null and void, and of no effect, and that the defendant" in that action, "and every person claiming under her subsequent to the recording of the notice of the pendency of the action, be and are forever barred from asserting any title to the premises as against the title of the plaintiff therein." A certified copy of the judgment and decree was recorded in the office of the register of deeds, on the first day of July, 1876. Upon the

facts found by the trial court in this action the appellant raises several objections to the validity of the judgment above referred to in favor of the assignee in bankruptcy, under whom the defendant, through several mesne conveyances, claims title.

1. The service of the summons was by publication, and the judgment was rendered upon proof thereof, and upon the plaintiff's application, in default of any appearance or answer of the defendant in that action. The plaintiff claims that the statutory procedure in the district court was not made applicable to the court of common pleas, and hence that the proceedings for the service of the summons, and the judgment in that court, were without authority of law. But we think otherwise. The requisite authority of the court is clearly implied from the language of the first and ninth sections of the act creating the court of common pleas of Hennepin county, (Sp. Laws 1872, c. 177,) by which it is given equal and concurrent jurisdiction with the district court in all cases arising or triable in Hennepin county; and the court, judge, and clerk are given like jurisdiction, power, and authority in all proceedings therein, and shall perform the same duties as the district court, judge, and clerk. These provisions are to be liberally construed so as to give them full effect in their practical operation, which could only be under the same statutory procedure provided for the district court in both civil and criminal cases; none being specially provided for in the common pleas. No other construction would be reasonable or tolerable. The common pleas as well as the district court would acquire jurisdiction of a defendant, under Gen. St. 1878, c. 66, § 69, when the summons provided for in that chapter had been served either personally or by publication. And, in like manner, a plaintiff would be entitled to apply for judgment in the court of common pleas under section 210, and that court would have the same power to act as the district court, and under the same statutory procedure.

2. It is also claimed that the court had no jurisdiction of an action brought by an assignee in bankruptcy to set aside a fraudulent conveyance of his land by a bankrupt. The action is not in contravention, as we understand it, of any United States statute; and we are unable to discover any valid reason why the assignee claiming

the property may not bring such action in the courts of the state within whose jurisdiction the property is situated. Such an action presents no federal question. *Mann v. Flower*, 25 Minn. 500; *Kidder v. Horrobin*, 72 N. Y. 159; *McKenna v. Simpson*, 129 U. S. 506, (9 Sup. Ct. Rep. 365.)

3. By section 5046, Rev. St. U. S., all property conveyed by the bankrupt in fraud of his creditors shall, by virtue of the adjudication of bankruptcy and the appointment of his assignee, be at once vested in such assignee. A judgment creditor claiming a lien upon the real property of his debtor may bring an action to remove the obstruction caused by a fraudulent conveyance before selling the property, or he may acquire title by execution sale, and then bring his action. *Jackson v. Holbrook*, 36 Minn. 494, 499, (32 N. W. Rep. 852;) *Wadsworth v. Schisselbauer*, 32 Minn. 84, (19 N. W. Rep. 390.) The object is to remove the obstruction, or uncover the property, so that it may be disposed of at the best price, and the proceeds appropriated to the satisfaction of the demands of creditors. That is substantially the nature of the action brought by the assignee against this plaintiff. *Heidritter v. Elizabeth Oil-Cloth Co.*, 112 U. S. 294, 300, (5 Sup. Ct. Rep. 135;) *In re Gurney*, 7 Biss. 414; *Rinchey v. Stryker*, 28 N. Y. 45, 31 N. Y. 140. The action was not then an action *in personam*, but must be classed with actions *in rem*. The judgment sought to be recovered therein affects the land only, and it was an action where service by publication upon the non-resident defendant was proper, and one which falls within the provisions of Gen. St. 1878, c. 66, § 64, subd. 5. *Pennoyer v. Neff*, 95 U. S. 714, 733. See *Bennett v. Fenton*, 41 Fed. Rep. 283.

4. It is further insisted by counsel that the findings of the court of common pleas in that action do not support the judgment. In considering this and several other objections to the validity of the judgment, the distinction between errors and defects which go to the jurisdiction, and render the proceeding wholly void and of no effect, and such as must be remedied in the same proceeding by appeal or otherwise, must be carefully observed. *Salter v. Hilgen*, 40 Wis. 363, 365, 366. It is not enough that there are irregularities in practice, or unsubstantial variances between the summons and complaint, or

that the pleading is double, or improperly unites several causes of action, or contains more allegations or grounds for relief than is essential, or that the complaint is defective or incomplete, or that the findings of the court fail to cover all the issues tendered. If the matters determined are decisive of the case, and within the general scope of the allegations made and relief asked, the determination is not void, though the defendant has not appeared. *Dillon v. Porter*, 36 Minn. 341, (31 N. W. Rep. 56;) *Hersey v. Walsh*, 38 Minn. 521, (38 N. W. Rep. 613;) *Peck v. New York & N. J. Ry. Co.*, 85 N. Y. 246, 251; *Gillett v. Truax*, 27 Minn. 528, (8 N. W. Rep. 767.) Recurring to the allegations in the complaint in the former suit, which we have referred to, and which are taken from the findings of the trial court in this case, it is clear that they are sufficient to uphold a judgment for the relief asked, viz., to set aside the deed as fraudulent and void as against the assignee, who represented the creditors of the insolvent grantor. The findings of fact in that case were not necessarily inconsistent with the complaint, though imperfect, and made, perhaps, upon a wrong theory. Among other things, the deed, purporting to bear date more than a year before its delivery to plaintiff, is found not to have been delivered till after the insolvent had been declared a bankrupt, and his property assigned, though previously recorded; that he himself placed the same upon record long after he became in fact insolvent, and when he was owing a large amount of indebtedness. This would justify the legal conclusion that the deed was fraudulent and void as to the plaintiff, Hale, (*In re Gurney*, 7 Biss. 414; *Robinson v. Elliott*, 22 Wall. 513;) and it is not material that the evidence and finding made a stronger case in respect to the time of the delivery than is stated in the complaint. The effect of the judgment subsequently rendered was to set aside the deed, and to declare the same null and void; and this would enable the assignee to give a clear title. We do not see that the form of the judgment is prejudicial to the plaintiff. As respects her rights, it is not material that the deed should be declared void as to creditors, instead of being declared void generally. The error could only be corrected by proceedings in the same action.

5. In the published summons in that action there was a clerical

mistake in the spelling of plaintiff's name, caused by the change of a single letter. Her name was then Beulah M. Plimpton. As printed, it read "Berlah M. Plimpton." In the judgment of the trial court, this was not deemed so material a change as to be misleading. And we think this will be sufficiently apparent when the two names are placed in juxtaposition. The plaintiff, or any one knowing her, could hardly mistake as to the person intended. *Seaver v. Fitzgerald*, 23 Cal. 86, 92, 93; *Stevens v. Stebbins*, 3 Scam. 25; *Belton v. Fisher*, 44 Ill. 32; *Stewart v. State*, 4 Blackf. 171; *Schooler v. Asherst*, 1 Litt. 216, 13 Am. Dec. 233, note; *Mallory v. Riggs*, 76 Iowa, 748, (39 N. W. Rep. 886.)

6. The proof of the publication of the summons is, we think, sufficient, though there is a clerical error here, also; the affidavit stating a publication of "seven" instead of "six" weeks between the dates of the first and last publications, which distinctly appear; but the error is clerical and it appears sufficiently clear that it was published six full weeks successively "once a week."

7. A further error or irregularity in respect to the form of the summons as published is also claimed to be fatal. The summons and complaint appear to have been issued together and placed in the hands of the sheriff of Hennepin county for service upon the defendant. On the 18th day of August, 1874, he made his return that the defendant could not be found in that county, and the summons and complaint with the return thereon were both duly filed in the office of the clerk of the court of common pleas in the county of Hennepin on the 20th day of August, 1874. The summons was in the following form:

"STATE OF MINNESOTA, COUNTY OF HENNEPIN.—COURT OF COMMON
PLEAS.

"*William E. Hale, as Assignee of Joseph Hodges, a bankrupt, Plff.,*
vs. Berlah M. Plimpton, Dft.

"Summons.

"*The State of Minnesota to the Above Named Defendant: You*
are hereby summoned and required to answer the complaint of the

plaintiff in the above entitled action, which is hereto attached and served on you, and to serve a copy of your answer to the said complaint on the subscriber, at his office in Minneapolis, in the county of Hennepin, in said state, within 20 days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded therein, together with costs and disbursements of this action.

“W. E. HALE, Plaintiff's Attorney.

“Dated August 15, A. D. 1874.”

The affidavit for the publication of the summons was in all respects in due form as required by the statute, and all the conditions precedent to an authorized and lawful publication of the summons were complied with. It will be observed that the provisions of the statute for the publication of the summons contain no direction as to the form or contents of the summons, or the notices to be inserted therein as published. In this respect it differs from the statutes of New York and other states under which certain decisions cited by appellant were made. For instance, the New York Code provided that in cases of publication, “the complaint must first be filed and the summons as published must state the time and place of such filing.” The Wisconsin statute was substantially similar to that of New York. Rev. St. 1858, c. 124, § 10; Taylor's Stat. c. 124, § 12. The California statutes in relation to the summons and service thereof are also essentially different from ours. After a careful consideration of the subject we think the importance of the omission is exaggerated by the plaintiff, and that it does not go to the jurisdiction, but must be treated as an irregularity in practice. The essential requisites of a summons as answering the purpose of process are prescribed by Gen. St. 1878, c. 66, § 53, and these are all found in the summons in question, while §§ 54 and 55 provide that the summons shall also contain certain notices and directions regulating the practice. See *McCoun v. N. Y. Central, etc., R. Co.*, 50 N. Y. 176. Had this summons been personally served on the defendant, the court would unquestionably have acquired jurisdiction to proceed; and if she

could save her right to object on this ground, it would have been her duty to have appeared either generally or specially and taken such proceedings as she might be advised. *Dunn v. Bloomingdale*, 14 How. Pr. 474; *McCoun v. N. Y. Central, etc., R. Co.*, 50 N. Y. 176; *Foster v. Wood*, 30 How. Pr. 284; *Dew v. Cunningham*, 28 Ala. 466. The omission to notify the defendant that the complaint is filed will not be considered such an irregularity as would affect a substantial right, or subject a judgment rendered by default to attack in another proceeding. *Foster v. Wood*, *supra*. And so if under the section providing for service by publication the residence of the defendant had been known, and a copy of the summons (which is all that the statute requires to be mailed) had been sent to her through the post-office, and had been received by her, (as would be presumed until the contrary appeared,) it would hardly be claimed that the service was a nullity. But the statutory requirements in respect to the publication of the summons are the same whether the residence is known or not. The statute fixes the time for answering the complaint, which is to be stated in the summons, but a variance in this respect is held to be an irregularity merely. Thus a summons requiring a defendant to answer in twenty days, where the law gave ninety days, was sustained because the party was presumed to know his rights under the law, and the mistake did not affect the substantial rights or remedies of the defendant. *Porter v. Vandercook*, 11 Wis. 70; *Morgan v. Woods*, 33 Ind. 23; *Gribbon v. Freel*, 93 N. Y. 93; *Gould v. Johnston*, 24 Minn. 188. That matter, as well as the nature of the notice in the summons informing the defendant of the particular judgment or relief that will be taken or applied for in default of an answer, is not modified or controlled by the section providing for publication, so that mistakes therein would not necessarily vitiate the published summons, though in some cases they might in practice be quite as misleading to the defendant as the error or omission complained of here. In *Gribbon v. Freel*, 93 N. Y. 93, the defect was in the published summons. It is true there was service outside the state, but the proceeding was regulated by the statute authorizing publication in respect to the form of the published summons. *Brooklyn Trust Co. v. Bulmer*, 49 N. Y. 84. Here the summons clearly dis-

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closes the court in which the suit was brought, and in which the answer to the complaint therein must be served, and the name and residence of the plaintiff's attorney; the defendant could hardly be misled in any particular. Formal defects in a summons served by publication upon a non-resident will not prevent jurisdiction attaching any more than in other cases, if such service is shown by the record to have been authorized, and to have been completed by the publication required by the statute. *Armstrong v. Middlestadt*, 22 Neb. 711, (36 N. W. Rep. 151; 1 Abbott's New Practice, p. 386, § 24; *Loring v. Binney*, 38 Hun, 152; *Morgan v. Woods*, 33 Ind. 23; *McCully v. Heller*, 66 How. Pr. 468; *Waltz v. Borroway*, 25 Ind. 380; *Van Wyck v. Hardy*, 4 Abb. Dec. 496; *Gribbon v. Freel*, *supra*.

Order affirmed.

GILFILLAN, C. J. I dissent. I think in statutory proceedings to obtain substituted service, service by notice given through a newspaper, inserting the name "Berlah" instead of the true name "Beulah," no matter how it occurred, by mistake or otherwise, would vitiate the service. One name is not *idem sonans* with the other.

FLAVIN BENJAMIN, Administrator, *vs.* PATRICK D. SMITH.

April 11, 1890.

Replevin—Omission to Claim Immediate Delivery.—The action of replevin is not changed into one for conversion by plaintiff omitting to claim an immediate delivery under Gen. St. 1878, c. 66, § 132.

Action brought in the district court for Rice county, the complaint alleging that since the decease of John Doyle, plaintiff's intestate, the defendant, in Rice county, wrongfully and unlawfully took possession of certain described personal property, of the value of \$600, owned by the decedent at the time of his death, and of which the plaintiff, as administrator, is entitled to immediate possession, and that the defendant now wrongfully detains the property at Le Sueur coun-

ty. The complaint properly alleges plaintiff's appointment as administrator and a demand on defendant, and prays judgment for the immediate return and possession of the property, or for its value, with \$25 damages for its detention. The plaintiff took no steps to obtain possession pending suit. Before answering the defendant demanded that the place of trial be changed to Le Sueur county, where he resided, and after answering moved the court to order such change, which motion was denied by *Buckham, J.* The cause was thereafter tried before the same judge, with the following verdict: "We the jury find for the plaintiff, and assess his damages at the sum of \$241.46." The defendant appeals from an order refusing a new trial.

J. B. O'Malley and *H. J. Peck*, for appellant.

Thos. H. Quinn, for respondent.

GILFILLAN, C. J. The action for possession of personal property is commenced by the service of summons, as other actions are, and not, as was the former action of replevin, by writ requiring a seizure of the property. The statute (Gen. St. 1878, c. 66, § 132) leaves it optional with the plaintiff to claim an immediate delivery at the time of issuing the summons, or after that and before answer, or to waive that, and let the action proceed, the possession to be obtained upon execution after judgment. The character of the action is determined by the complaint, and not by the plaintiff claiming, or failing to claim, immediate delivery. If he waive his right to an immediate delivery, the action is not thereby changed to one for conversion merely. The action was therefore properly triable in the county of Rice, and the court correctly denied the motion for a change of venue. The evidence justified the verdict.

Judgment affirmed.

BENJAMIN F. FERRISS vs. ROBERT SCHREINER and another.

April 11, 1890.

Livery-Stable Keeper's Lien—Surrender of Possession.—The lien given by Gen. St. 1878, c. 90, § 17, as amended by Laws 1885, c. 81, depends on possession of the property, so that if the party entitled to the lien, voluntarily, and without reservation, deliver the property to the owner, his lien is gone.

Evidence *held* to justify the findings.

Appeal by plaintiff from a judgment of the municipal court of St. Paul, and from an order refusing a new trial.

O. H. Comfort, for appellant.

Otto L. Haese, for respondent, Schreiner.

Propping & Wislizenus, for respondent, Rathjens.

GILFILLAN, C. J. Replevin to recover possession of certain horses, wagons, and harness; plaintiff basing his claim of right to the possession upon a claim to a lien upon the property for boarding the horses, and storing the wagons and harness. The property belonged to defendant Schreiner, who, on February 8, 1889, made a general assignment to defendant Rathjens for the benefit of his creditors; and the latter at once qualified, and entered on the duties of the trust. On February 9th, he demanded the property from plaintiff, and the latter voluntarily delivered it to him. At that time, plaintiff held the property under a claim of a lien for board and keep of the horses, and storage of the other property, amounting to \$80. These facts were found by the court below, and the evidence was sufficient to sustain the findings.

Plaintiff's lien was under Gen. St. 1878, c. 90, § 17, as amended by Laws 1885, c. 81. The lien given by the statute was undoubtedly intended to be analogous to the common-law lien on personal property, such as the lien for alterations or repairs, in this respect—that it should depend upon possession of the property by the person claiming the lien. The common-law lien was only a right of detention till payment of the amount to secure which the lien was

given. So, if the party entitled to the lien voluntarily parted with the possession to the owner, unless for a temporary purpose, and under an agreement to return the property, the lien—the right of detention—ceased. The plaintiff, having voluntarily surrendered the property to the owner, had no further lien on it.

Judgment affirmed.

NOTE. A motion for a reargument of this case was denied April 22, 1890.

GERANDO M. HANCHETT and others *vs.* ROBERT C. JORDAN and Wife.

April 11, 1890.

Contract—Delivery on Sunday.—*Held* there was evidence to justify a particular instruction, correct as an abstract proposition of law.

Plaintiffs brought this action in the district court for St. Louis county, praying (among other things) that a written assignment by defendant Robert C. of his interest in a land contract, be reformed by inserting plaintiffs' names as assignees. The writing bore date October 11, 1888, and one ground of defence was that it was executed and delivered on Sunday. At the trial of this issue, before *Holland, J.*, (acting for a judge of the 11th district,) one of the plaintiffs, Frank G. Stevens, testified that the assignment and the note it was given to secure were made and delivered to him on Thursday, but further testified to the effect that it was understood that the matter should rest until his partner, the plaintiff Hanchett, should arrive on the following Sunday, as the witness did not wish to accept such security on his own account, or to act without Hanchett's consent. The court instructed the jury, among other things, (plaintiffs excepting,) that "any paper affecting real estate takes effect from its delivery. If you find that this paper was executed and left with the plaintiffs, and that any contingency was to take place before it was to go into effect, and find that that contingency contemplated took place on Sunday, then the paper was executed on

Sunday, and has no force whatever." The defendants had a verdict, and the plaintiffs appeal from an order refusing a new trial.

White & Reynolds, for appellants.

S. D. Allen, for respondents.

GILFILLAN, C. J. The instruction to the jury upon which the assignments of error are based is conceded to be correct as a proposition of law, the only objection to it being that, as there was no evidence in the case to which it could be applicable, it might mislead the jury. There was, however, evidence in the testimony of the plaintiff Stevens from which the jury might have found that the delivery of the paper on Thursday, testified to by him, was not regarded by the parties as a final delivery, made with intent that the paper should go into effect by reason of it, but that the consummation of the delivery was postponed to abide the result of the conference with the plaintiff Hanchett, agreed to be had and in fact had on Sunday. This being the case, the instruction was proper.

Order affirmed.

JOHN SOMERDORF and Wife *vs.* FERDINAND SCHLIEP.

April 11, 1890.

Deed—Breaches of Covenant.—Evidence *held* not to justify findings of fact.

Appeal by defendant from an order of the district court for McLeod county, refusing a new trial after a trial by *Edson, J.*

R. H. McClelland, for appellant.

Willis & Nelson, for respondents.

GILFILLAN, C. J. November 2, 1883, the plaintiffs executed to the defendant and the daughter of the plaintiff Caroline by a former husband, a deed conveying to them, their heirs and assigns, forever, the farm upon which plaintiffs were then living, in McLeod county. The deed recites that it is in consideration of an agreement which was executed at the same time. The deed contained this clause:

"The performance of the conditions contained in the farm contract hereinbefore set forth, except such as may hereafter be waived by the parties of the first part, are conditions precedent to the taking effect of this deed." The agreement referred to was by deed executed by all the parties to the conveyance. It was, in effect, on the part of the grantees, an agreement to farm the land during the life of the grantors and the survivor of them; to pay to them or the survivor one-third of all the crops; to pasture, feed, and take care of for them two cows and two sheep; and to allow them the use of a team and wagon to attend church on Sundays. It contained covenants on the part of the grantees to cultivate and manage the farm to the best advantage; to keep up the fences, so as to protect the crops; to keep in repair all buildings; not to commit waste, nor suffer it to be done. The grantors reserved the right to the exclusive use of the dwelling on the farm and the adjoining garden, consisting of about half an acre. They were to pay one-third of all the taxes, and one-third of the threshing-bills. There was a stipulation that, should the grantees "fail for three months after demand to deliver one-third of the crop to the parties of the first part, as above required, then the parties of the first part may declare this agreement to be at an end, and require the parties of the second part to abandon the premises." The grantees at once went into possession and continued in possession till the death of the daughter, since which time defendant continued in possession. In April, 1889, plaintiffs served on defendant a written notice that they revoked the conveyance and agreement. This action is to have the instruments annulled and declared void. The facts alleged in the complaint, as the basis to the claim for judgment, are that the conveyance was wholly without consideration; that the defendant has failed to cultivate the land to the best advantage; to deliver one-third of the crops; to keep up and maintain the fences, so as to protect the crops from injury and waste; to protect the fruit and shade trees; to crop the land in proper manner and style, to the best interests of the plaintiffs; to pasture and feed the cows and sheep for plaintiffs; and to permit them to use a team and wagon to attend church. The cause was tried without a jury, and findings of fact and conclusions of law directing judgment for

plaintiffs were filed. The case is here on an appeal from an order refusing a new trial.

The two instruments were executed together, with reference to the same subject-matter, and are to be considered as though the stipulations in both were in one instrument. The covenants by the grantees in the one we have designated the agreement, especially the covenants to deliver one-third of the crops, to keep the cows and sheep, and to furnish a team and wagon Sundays, certainly constituted a sufficient consideration, not only for that agreement, but for the conveyance which was executed in consideration of that agreement, and of the covenants it contained. The conclusion of the court below, that the conveyance was without consideration, was therefore erroneous.

The instruments, having a consideration to sustain them, vested in the grantees rights not dependent on the will of the grantors. What the precise character of the grantees' interests under the two instruments may be, whether an estate for the life of the grantors and the survivor of them, (terminable in the manner specified in the "agreement,") with the right to a conveyance of the fee by their heirs upon the death of both grantors, or such life-estate with remainder in fee upon the determination of it by the death of both grantors, it is not necessary now to decide. It is enough, for the purposes of the case, that the grantors could not terminate such interests without cause. Their notice of revocation was of no effect. It may be conceded that a court of equity would cancel the two instruments for a failure on the part of the grantees to fulfil the covenants on their part, though, as the parties have stipulated a remedy, it may be doubted that it would do so for failure to deliver one-third of the crop. But certainly, before a court would administer the extreme remedy of cancelling the instruments or either of them, and forfeiting the rights of the grantees, it would have to appear that they had failed to perform the covenants in substantial and material particulars, and a waiver of a right to complain on the part of the grantors would defeat the right to such a remedy. The court below, in its findings of fact, specifies a good many particulars in which the grantees failed to perform the covenants, and also finds that such failures were not consented to nor waived by the plaintiffs, but does not find

as a fact that any of such failures were substantial and material. The evidence in the case would not justify that finding, and the evidence was such as to require a finding that the failures were acquiesced in and waived. It does not appear but that the farm was maintained and cultivated in a proper manner, according to the standard of the part of the country in which it was situated. Some acts of waste are specified, such as the removal of the fence surrounding the yard of the dwelling, the cutting down of two fruit-trees and one shade-tree, and suffering fences to fall into decay. It is also specified that one-third of the crops was not delivered, particularly one-third of the hay, one-third of the garden vegetables, and one-third of the tobacco raised on the place. How much less than one-third of the hay was delivered is not specified, and does not clearly appear from the evidence. How much tobacco there was is not specified. The evidence was that it was raised one year on about two square rods of ground, so that there could not have been a great deal. What was the quantity and value of the garden vegetables does not appear. Plaintiffs had their own garden, and plaintiff John testified that it was agreed each should have a garden, and "what I didn't have in my own garden he was to give me out of his. I did not ask him for anything out of his that he did not give me." The parties lived all the time on the farm, part of the time in the same house. They do not appear to have exacted from each other literal compliance with the terms of the agreement. Plaintiffs failed to pay one-third of the taxes and of the threshing-bills. Defendant paid the whole, and nothing seems to have been said about it. And, although the various particulars of failure on the part of defendant must have been known to them at the time of occurring, neither of the plaintiffs made any complaint to defendant, except on two occasions, on one of which the plaintiff Caroline complained of the condition of one of the fences, and defendant set it right the next day; on the other, the plaintiff John complained to defendant that the wheat delivered to him the year before was not equal in quality with that which defendant had kept. From all the evidence, as well that on the part of the plaintiffs as that on the part of the defendant, the conclusion is irresistible that, up to a time immediately before the

commencement of the action, both sides regarded the covenants on the part of the grantees as substantially complied with, and that each party was content to disregard the literal failures by the other. If plaintiffs deemed that they had any cause of complaint by reason of such failures on the part of defendant, good faith required that they should make their complaint known to defendant. Their silence must be taken as acquiescence and waiver.

Order reversed.

CHARLES ORTLOFF and another vs. EMIL KLITZKE.

April 11, 1890.

Statute of Frauds—Sale—Delivery.—The delivery requisite to take a verbal agreement for the sale of goods out of the statute of frauds may be subsequent to such agreement.

Appeal by defendant from an order of the district court for McLeod county, *Edson*, J., presiding, refusing a new trial after verdict for plaintiffs.

R. H. McClelland, for appellant.

W. F. Schoregge, for respondents.

GILFILLAN, C. J. Replevin for a threshing-machine. The machine originally belonged to the plaintiffs, Ortloff and Schuft, as tenants in common. Defendant claims to have purchased the interest of Schuft, and to have taken possession, and to have been in possession when the action was commenced, under that purchase, and as a tenant in common with Ortloff. The value of the machine was from \$400 to \$600. On the trial, there was some evidence on the part of the defendant of an oral agreement between him and Schuft for the sale by the latter to him of his interest in the machine,—no part of the purchase price being paid at the time, and there being then no delivery of the machine. There was also evidence that subsequently Schuft told defendant to take the machine, and he accordingly took it. This would tend to show a subsequent delivery and acceptance pursuant

to the oral contract of sale. The court instructed the jury that if at the time of the alleged sale there was no immediate delivery, and no part of the purchase price paid, and no written contract of sale, they should find for the plaintiffs; and also that there must be some memorandum made, unless there is an immediate delivery at the time the contract was made. This was error, as, if the jury had found—and under the evidence they might have found—that there was a subsequent delivery and acceptance, it would have satisfied the statute. The delivery requisite to take a verbal agreement for the sale of goods out of the statute of frauds, may be subsequent to the agreement. *McCarthy v. Nash*, 14 Minn. 95, (127;); *Gaslin v. Pinney*, 24 Minn. 322. We do not see any other substantial error in the case.

Order reversed.

CITY OF DULUTH vs. JAMES E. HENNEY and others.

April 16, 1890.

Duluth—Contractors' Bond to pay Laborers—Payment in Full to Contractors—Sureties not Discharged.—Upon the completion of the work provided for in the contract mentioned in *State Bank of Duluth v. Heney*, 40 Minn. 145, the city settled with the contractors, the principals in the bond which was construed in that case, and paid them in full. This action was brought by the city, for the use and benefit of the plaintiff in the former suit and another person, upon said bond. *Held*, that the sureties thereon were not released or discharged from the obligation of the bond by reason of payment in full to the contractors.

Appeal by plaintiff from an order of the district court for St. Louis county, refusing a new trial after trial before *Stearns, J.*, and verdict directed in favor of defendants Ray & Carey, the sureties on the bond in suit.

White & Reynolds, for appellant.

Wm. B. Phelps, for respondents.

COLLINS, J. This is an action by the city, obligee, upon the bond considered in *State Bank of Duluth v. Heney*, 40 Minn. 145, (41 N.

W. Rep. 411,) and to recover for the use and benefit of the owner, said bank, upon the claims which it attempted to collect in the former case; and also to recover for the use and benefit of Duncan, Gamble & Co., who furnished the same, the value of certain materials which were sold to the principals in said bond, and used by them in fulfilling the contract referred to in the opinion, *supra*. At the conclusion of the trial a verdict was ordered and rendered in favor of two of the respondents, the sureties upon said bond. The appeal is from an order refusing a new trial. In the decision before mentioned the bond in question was construed as intended, among other things, to secure the payment of laborers who might be employed by the contractor, and the payment of those who might furnish materials to be used in the performance of the contract. It was further determined that the city, as the obligee named in the bond, could alone maintain an action upon it to enforce the collection of claims held by either laborers or material-men. But the respondents now contend that by reason of certain provisions to be found in the contract between the city and the principals in the bond, under which the work was performed, and because upon the completion of the work the city paid to the contractors the full amount due them upon the contract, the sureties upon the bond have been released and discharged, and, as against them, no recovery can be had. In other words, that under the contract it was the duty of the city to withhold payment to the contractors until satisfied in some manner that all claims for labor performed or materials furnished had been liquidated; and that, if the city has failed to perform such duty,—has improvidently paid the contractors,—the laborers and material-men have been deprived of a right to recover through the bond. The provisions of the contract under which this somewhat singular position is taken, are those usually found in agreements of this nature; in brief, that no payments are to be made to the contractors until the work shall be completed in the manner agreed upon, and such completion certified to by the engineer and inspector in charge, nor until each and every of the stipulations previously mentioned in the contract has been complied with. Whereupon the city agrees to pay, on or before the 15th day of the month next succeeding that in which the work is done, 85 per cent.

of the monthly estimate. The remaining 15 per cent. is to be retained until the contract is fully completed and the work accepted. There is also in the contract the customary agreement on the part of the contractors that all claims for labor and materials shall be promptly paid. The conditions of the bond are plain, and now beyond controversy; and conceding it to be within the power of the city to use any language in its contracts, or to perform any act, whereby the rights of those for whose benefit the bond is required and executed may be jeopardized or lost, we fail to discover any stipulation or condition in the contract from which even an inference can be drawn that the city assumed, or that there was cast upon it, the duty of seeking out the various laborers and material-men who contributed to the completion of the contract, and ascertaining the state of their accounts with these contractors before making final and complete payment for the work. It is barely possible that the authorities would have been justified in refusing payment until it had been made to appear that there were no outstanding claims; but we are asked to go further than this, and to say that as to all contracts for street-grading there has been imposed upon the city of Duluth an obligation to see to it that all laborers employed upon the work, and all material-men with whom the contractors have dealt, have been fully paid, before settling with the latter; and that during the progress of the improvement it must retain in its hands a sufficient amount of the money earned to meet and discharge demands of this character. There is nothing in the charter, nor in the contract itself, which suggests that such an extraordinary task has been assigned to or assumed by the municipality, and, should the views and construction demanded by the respondents be adopted, the utter impossibility of the carrying on of street improvements by a city of any size, with any degree of safety, under the contract system, seems obvious.

The respondents make the further point, as to a portion of the claims, that by accepting the so-called "time-checks" the laborers extended the day of payment for their work beyond that originally agreed on, without the knowledge of the sureties on the bond, and hence the latter are discharged from the liability theretofore existing. Upon this we shall only say at this time, that the answer contained

no allegation under which testimony relative to such extension could properly be received. For that reason, if for no other, the appellant's objection to the testimony should have been sustained. A new trial must be had.

Order reversed.

W. S. BUFFHAM and another vs. ANDREW L. PERKINS and Garnishee.

April 16, 1890.

Municipal Court—Vacating Judgment after Transcript Filed.—The municipal court of the city of St. Paul has the authority, upon a proper showing, to vacate and set aside its judgments after transcripts thereof have been filed in, and executions issued out of, the district court, as provided and required by Sp. Laws 1889, c. 351, § 3.

On September 21, 1889, plaintiffs recovered judgment (for \$107.28) by default in the municipal court of St. Paul against Hattie T. Stone, and Stone & Co., as garnishees of the defendant Perkins. On September 23d, transcripts were issued and filed in the district court for Ramsey county, and executions issued from that court. On October 5th, on application of Hattie T. Stone, the municipal court made an order vacating the judgment against her, and requiring her to make disclosure on October 12th, and an order enjoining the sheriff from enforcing the execution against her. From these orders the plaintiffs appeal.

W. F. Carroll, for appellants.

M. D. Munn, for respondent.

COLLINS, J. As that part of the order of the municipal court bearing date October 3, 1889, which restrained the sheriff of Ramsey county and his deputies from further proceeding under the execution issued in this action, had by its own terms ceased to be of force or effect several days prior to the taking of this appeal, we do not deem it necessary to pass upon the alleged error of the court in this respect.

The only remaining question of any moment whatever is that of the jurisdiction of the municipal court of the city of St. Paul over its judgments—its right to vacate or modify them, after transcripts have been filed in the district court, and executions issued therefrom, as provided by section 3 (p. 995) of the amendatory act, (Sp. Laws 1889, c. 351,) which deprived the court in question of the power, previously exercised under Gen. St. 1878, c. 64, § 96, to enforce its judgments by execution until such time as transcripts were filed in district court, and the judgments became liens upon real estate, and which granted to the last-named court the exclusive right to issue executions upon judgments of the municipal court, to be issued only after transcripts had been filed. It was determined in *Crosby v. Farmer*, 39 Minn. 305, (40 N. W. Rep. 71,) under the law as it existed before the amendment of 1889, that, notwithstanding a transcript had been filed in the district court, and it alone had the authority to enforce the collection of a judgment of this same municipal court by execution, the judgment was that of the latter court for all purposes except that of compelling its payment by execution. The municipal court, therefore, retained control over, and could vacate and set aside, its judgments, upon a proper showing. The amendment of 1889 has not changed the law upon this point, and the views of the court as expressed in *Crosby v. Farmer* are pertinent and applicable here.

Both orders affirmed.

LOUIS SCHROEDER vs. FRANK HARRIS, impleaded, etc.**April 16, 1890.**

Appeal from Justice—Dismissal instead of Affirmance—Harmless Error.—From a careful examination of the record in this action, it is manifest that the proceedings in justice's court, which resulted in a judgment against this appellant, were regular and sufficient in every particular. *Held* that, even if the district court erred in dismissing an appeal upon questions of law alone, instead of affirming said judgment, (on which no opinion is expressed,) the error was without prejudice.

Appeal by defendant Harris from an order of the district court for Becker county, *Mills, J.*, presiding, dismissing his appeal (on questions of law only) from a judgment of \$34.46 against him in justice's court, on the ground that it was described in the notice of appeal as a judgment of \$2.50.

W. W. Rossmann and Jeff H. Irish, for appellant.

C. M. Johnston and Walter J. Trask, for respondent.

COLLINS, J. Appeal from an order of the district court dismissing an appeal, upon questions of law alone, from a judgment rendered in justice's court. We have carefully examined the very full and complete record of the proceedings in the trial court, and it is manifest that no error can be found therein. If, therefore, the district court committed a mistake in dismissing the appeal, as to which we express no opinion, it was without prejudice to the appellant. Instead of having the justice's judgment affirmed, as it should have been on the record, there was simply a dismissal of the appeal. Of this result the appellant ought not to complain.

Order affirmed.

W. H. BURNS and another vs. HENRY MALTBY and others.

April 16, 1890.

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Mechanic's Lien—Action by Material-Men on Contractor's Bond—
Admission—Pleading in Former Suit.—Several rulings of the trial court, whereby it excluded certain testimony from the jury, examined and considered. Held, that none of said rulings were erroneous.

Appeal by defendant William H. Ulmer (one of the sureties in the bond on which the action was brought) from an order of the district court for Ramsey county, refusing a new trial after trial before Wilkin, J., and verdict of \$4,081.07 directed for plaintiffs.

John D. O'Brien, for appellant.

Howard L. Smith, for respondents.

COLLINS, J. Maltby, one of the defendants, entered into a contract with W. A. and C. W. Fitzer, to erect and complete for them a certain building. As permitted and authorized by the terms of the statute then in force, (Gen. St. 1878, c. 90, § 3,) Maltby, as principal, with one Gregg and the appellant, Ulmer, as sureties, entered into a bond with the said Fitzers for the use of all who might do work or furnish materials, conditioned that Maltby should pay all just claims for work done or to be done, and for all materials furnished or to be furnished, pursuant to the said contract, and in the execution of the work therein provided for. The plaintiffs are the material-men who furnished certain lumber used in the construction of the building. This action is upon the bond to recover a balance due on account of the materials. Instructed so to do by the court, the jury returned a verdict for the plaintiffs, and from an order refusing a new trial Ulmer appeals.

A few days after the execution of the bond, Maltby, in writing, authorized and requested the Fitzers to pay over to Gregg all moneys due or to become due to him upon his contract; and the appellant insists that in refusing to allow this writing to be put in evidence, as tending to sustain his contention that the materials in question were, in fact, sold by plaintiffs to Gregg, and not to Maltby, the

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trial court erred. Conceding that the writing would have had the effect claimed for it, there is nothing in the settled case which indicates that plaintiffs were ever informed of the writing or the fact. It is true that Maltby testified that when he first applied to plaintiffs for the lumber he said to them that Gregg would handle the money. This was not disputed by the plaintiffs, but it falls far short of even an intimation that Maltby had irrevocably authorized and directed all payments to be made to Gregg. It is evident that unless the plaintiffs had some knowledge of the writing, or of the fact evidenced by it, the testimony was wholly inadmissible for the purpose indicated. In further support of the claim that the sale was to Gregg, appellant offered to prove that soon after the plaintiffs' refusal to sell the lumber to Maltby without further inquiry, Gregg went to see them, and thereafter the material was forthcoming, but the court declined to receive the testimony. This ruling was correct, for, if anything at all could have been inferred from the circumstances which appellant attempted to show, it might as well be that, through Gregg's intercession and representations, the plaintiffs yielded and gave the credit to Maltby, as that Gregg's visit confirmed their first impressions, and, as a consequence, the sale must have actually been made to him. Had the testimony been received, it would have had no significance or value whatever.

The appellant also urges that the court erred in declining to receive in evidence a reply in an action brought by the plaintiffs in this same court, against the Fitzers and others, for the value of the materials herein involved, and to have the said amount adjudged a lien upon the building, and on the lots on which it was erected. There are several reasons why the court was right in its views. The offer was as to the complaint in the other action, and not as to the reply. Although the counsel now claims that it was his intention to offer the reply—in which he asserts there were some admissions which would prevent the respondents from recovering herein—instead of the complaint, and that no one was misled by his mistake, he must be bound by the offer as made. It cannot be assumed that he committed an error in his offer, that no one has been prejudiced by it, and that his real purpose was well understood. Again, if, as

a fact, there were admissions in the pleading of the character specified, and which were material in the action at bar, the record fails to disclose it. The pleading itself was not produced in the court below. It was not made to appear there, nor has it been shown here, that there was anything in it which affected or would preclude a recovery upon the bond by plaintiffs. It did not and does not now appear that either of the plaintiffs signed or verified any of the pleadings in the action referred to, or have ever had any knowledge of the allegations therein, or that, from any cause, they became so far bound by any of their pleadings as to raise the presumption that its allegations of fact were authorized by them. Under such circumstances, there was no error in the ruling which excluded the pleading offered, or the one intended to be offered, in evidence. *Siebert v. Leonard*, 21 Minn. 442; *Vogel v. Osborne*, 32 Minn. 167, (20 N. W. Rep. 129.)

Order affirmed.

J. C. ZIMMERMAN, Administrator of Jost Vogely, *vs.* FRIDOLIN BLOOM.

April 17, 1890.

Evidence—Declarations of Decedent against his Interest.—Declarations made by a person since deceased may be received in evidence in an action between other parties, if it appear that the person making the declaration had knowledge of the fact declared, and that the declaration was against his interest.

Evidence *held* sufficient to justify the verdict.

Appeal by defendant from an order of the district court for Nobles county, *Perkins*, J., presiding, refusing a new trial after verdict of \$624 for plaintiff.

Daniel Rohrer, for appellant.

Geo. W. Wilson, for respondent.

DICKINSON, J. This action was commenced by the above-named Jost Vogely, and was tried in the district court before his death.

The action was to recover the amount of a promissory note, of \$400, given by the defendant to Vogely, January 1, 1881. The defendant admitted the making of the note, but alleged in defence that its execution was procured by false representations, and that there was no consideration for it. It appears from evidence in the case that long prior to the making of this note, the defendant had executed to other parties two notes, for \$400 and \$300, respectively, which Vogely had executed with him as his surety. The defendant claimed, and produced evidence tending to show, that the note sued upon was given in renewal of an earlier note to reimburse Vogely for payments which he claimed to have made upon those obligations of the defendant. The case also showed that long before the giving of the note in suit, the plaintiff, Vogely, executed with the defendant and the brother of the latter a note for \$700 to one Elmer; the plaintiff being a surety for the other makers. The claim of the plaintiff is that the note in suit was made to reimburse Vogely on account of the payment by him of the note to Elmer. The defendant (appellant) concedes that the evidence was sufficient to justify the conclusion of the jury that the note in suit had its origin in the note to Elmer.

It having been shown that Elmer had died, certain entries in private books, which he had kept, were introduced in evidence by the plaintiff; it being further shown that these entries were in the handwriting of Elmer. The defendant's assignments of error in respect to this evidence should not be sustained.

Exhibit J embraces the following statement or memorandum by Elmer in his book, under date of April 1, 1869: "According to note, I have loaned to the brothers Fridolin [this defendant] and Jacob Bloom, and Jost Vogely, money to the amount of 700.00, which they are to pay after two years with 9 per cent. interest until paid." Then follow, under various dates down to the year 1874, statements of the receipt of interest. Then comes the following statement: "For the above amount, Jost Vogely has given me a new note, and therefore the above-named \$700 are to be considered paid, with the exception of the fourth half-year's interest which is due to me from Fridolin Bloom." The defendant excepted only to the reception of the last sentence above recited. The fact of the giving of the \$700

note as stated in the book entry was virtually admitted by the defendant. The evidence to which the defendant's exception related was admissible, not as a matter of book-account, under the statute, but as a declaration of a fact, relevant to the issue, made by a person since deceased, he obviously having knowledge of the matter set forth in the statement, and the same being against his interest, pecuniary or proprietary. 1 Greenl. Ev. 147 *et seq.*; 2 Best, Ev. § 500 *et seq.*; Steph. Dig. Ev. arts. 25, 28, c. 4; 1 Phil. Ev. (Cow. & H. Notes,) 252 *et seq.*; *Higham v. Ridgway*, 10 East, 109, 3 Smith, Lead. Cas. (9th Ed.) 1607, and notes. Not only were the acknowledgments of the receipt of interest declarations against interest, but so was the acknowledgment by Elmer that he had accepted the note of Vogely alone in payment of the joint note of Vogely and two other persons.

From another page of the book, entries were also received, under the defendant's objection, relating to Jost Vogely's note of \$700, and acknowledging the receipt of interest on it, and, under date of April 2, 1877, that Vogely had paid the same, excepting a specified sum which had been thrown off. These entries as to Vogely's note were admissible in connection with those before introduced, and for the same reason. The reasons upon which the admissibility of secondary evidence of this character rests are such that it is not essential that the entries or declaration be shown to have been made at the time of the transactions referred to.

The entries from the same book embodied in the case as Exhibit L were not objectionable as being an attempt to impeach the defendant's testimony as to collateral facts. This evidence tended to rebut the defendant's claim that he had paid the \$700 note to Elmer.

The refusal of the court to instruct the jury as requested in respect to the asserted counterclaim growing out of the Stauffacher note was justified for the reason that the court had already instructed the jury, in effect, that, by the concession of the plaintiff, that item was to be allowed in favor of the defendant.

We are of the opinion that the verdict, which was a little less than the amount of the note sued on, was not greater than was justified by the evidence. The case justified the jury in concluding that after allowing, on account of the indebtedness existing at the time of the giv-

ing of this note, all the matters of counterclaim which were established in favor the defendant, the indebtedness was at least as large as the note given therefor. A review in this opinion of the evidence upon these matters would serve no useful purpose.

Order affirmed.

JAMES I. JELLETT vs. W. A. RHODE.

April 17, 1890.

Statute of Frauds—Lease for Year from Future Day.—A parol lease of real estate for the term of one year, to commence *in futuro*, is invalid, being an agreement which by its terms is not to be performed within one year from the making thereof.

Appeal by defendant from a judgment of \$78.82, in the municipal court of St. Paul.

Thompson & Taylor, for appellant.

S. C. Olmstead, for respondent.

DICKINSON, J. July 10, 1889, these parties entered into an oral agreement, the plaintiff leasing to the defendant certain real property for the term of one year from the 1st day of August, at a yearly rental of \$780, payable in monthly instalments in advance. The defendant entered into the occupancy of the premises on the 1st day of August, and remained in possession until the 28th of September, when he went out. This action is for the recovery of the stipulated monthly rental for the month of October, payable, according to the terms of the agreement, on the 1st of that month.

By the terms of our statute of frauds, (Gen. St. 1878, c. 41, title 2,) no action is maintainable upon a mere parol agreement that by its terms is not to be performed within one year from the making thereof, ✓ (section 6;) no estate or interest in lands, other than leases for a term not exceeding one year, nor any trust, etc., shall be created, unless by act or operation of law, or by deed or conveyance in writing, etc., (section 10;) and every contract for the leasing for a longer pe-

riod than one year, or for the sale of any lands or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party by whom the lease or sale is to be made, or by his authorized agent, (section 12.) The agreement upon which this action is prosecuted is clearly within the language of section 6. By its terms the agreement was not to be performed within one year from its making. There is no reason why that section should not be deemed applicable to such a case as this, unless it is to be considered that the exception in section 10, and the implied exception in section 12, of leases "for a term not exceeding one year," or for a period not longer than one year, are effectual to exclude from the operation of section 6 leases for a term of one year, to commence *in futuro*. The reasons which led to the enactment of that part of section 6, above referred to, are as applicable to parol agreements leasing land, not to be performed within one year, as in respect to any other kind of a contract. The evil result likely to follow from allowing such a contract, the performance of which is to be long postponed, to rest in parol, without any written evidence showing the terms of the agreement, are of the same nature, and just as likely to occur, as in the case of any other contract. If a merely oral lease may be effectually made for a year to commence *in futuro*, it matters not how long the commencement of the term may be postponed. If such a case is not within the provision of section 6, then a lease may be thus made for a term to commence many years subsequent to the agreement. Such a case is so clearly within the plain, explicit language of section 6, and would so obviously involve the very evils to avoid which has been the well-understood purpose of this clause of the statute of frauds, that it should be construed as applicable, unless the other sections of the law very clearly manifest the intention to withdraw or exclude such cases from its operation. Such an intention is not manifest. Full effect may be given to the excepted cases in section 10, and to cases within the implied exception in section 12, consistently with the applicability of section 6 to parol leases for a term not to be completed within one year. "Leases for a term not exceeding one year," or for a period not longer than one year, may be made, if the

term is to commence at once, and such a contract would not come within the terms of the statute as to agreements not to be performed within one year. We see no sufficient reason, either from the terms or arrangement of the statute, for excluding such cases as that before us from the operation of section 6. In this conclusion we are supported by the following authorities: *Olt v. Lohnas*, 19 Ill. 576; *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Dozer*, 22 Kan. 436; *Briar v. Robertson*, 19 Mo. App. 66; *Parker v. Hollis*, 50 Ala. 411; *Atwood v. Norton*, 31 Ga. 507; *White v. Holland*, 17 Or. 3, (8 Pac. Rep. 573.) See, also, *Roberts v. Tennell*, 3 T. B. Mon. 247.

The decisions upon the English statute of frauds (29 Car. II. c. 3) have but little bearing upon the construction of our statute, for the reason that by that statute parol leases for a term not exceeding three years from the making thereof were authorized, and of course the provision in section 4, as to agreements not to be performed within one year, could not be applicable to such cases. The same is true as to the statute of Indiana, in which state parol leases like that under consideration are held valid. In *Young v. Dake*, 5 N. Y. 463, it was held, overruling *Croswell v. Crane*, 7 Barb. 191, that such a lease was valid. The decision, however, was placed upon considerations which cannot be regarded under our statute. One of these considerations was the fact that in the revision of the statute the legislature eliminated from the clause of the statute of frauds, excepting leases for a term not exceeding one year, the qualifying words, "from the making thereof," which was regarded as disclosing an intention to allow such a term to commence *in futuro*. Again, it was considered that the statutory provision as to contracts which by their terms were not to be performed within one year was not applicable to contracts relating to leases of, or interests in, real estate, for the reason that the former provision was embraced in title 2 of the statute, entitled "Of fraudulent conveyances and contracts, relative to goods, chattels, and things in action," while the provisions in which parol leases of real estate were authorized are found in title 1, relating to "Fraudulent conveyances and contracts relative to lands." This reason for the decision in *Young v. Dake* is not available under our statute since the Revision of 1866, in which all of the provisions under considera-

tion are embraced in one title, denominated "Statute of Frauds." In Michigan and Wisconsin the statutes in this particular have been arranged and entitled as in New York, and in those states *Young v. Dake* has been followed, or cited with approval. It has also been followed in some other states, where the reasons upon which that decision was made were wholly inapplicable.

Judgment reversed.

ALPINE McLEAN vs. T. J. NICOL.

April 24, 1890.

Written Lease—Prior Oral Agreement.—Where there was a written lease of premises, *held*, that proof of a prior oral agreement to introduce gas and water into the premises during the term is not competent.

Appeal by plaintiff from an order of the municipal court of Duluth, denying his motion for a new trial in an action to recover \$90 rent reserved in a written lease.

Walter Ayers, for appellant.

Tear & Davies, for respondent.

GILFILLAN, C. J. This was an action for the rent of certain premises in Duluth for the months of March and April, 1889, under a written lease of the premises for a term commencing June 15, 1888, and ending May 1, 1889. The defendant occupied the premises under the lease from the commencement of the term until the last day of February, 1889, when he left them. As a reason for vacating the premises, and as the basis for his claim that no rent accrued for the months of March and April, defendant alleges that prior to the execution of the lease it was verbally agreed between him and plaintiff that the latter should lease to him the premises from June 15, 1888, to May 1, 1890, and at once proceed to put the gas and water service into the premises, and make connection with the gas and water mains as soon as they should be completely laid in the street opposite, and

the water turned in, and should give defendant a written lease of the premises, the rent to be \$45 per month until the gas and water service should be put in the premises, and \$50 per month thereafter. The written lease provides that the defendant shall pay rent at the rate of \$45 per month until the gas and water service shall be introduced into the premises, and after that time at the rate of \$50 per month; but there is no express covenant by the lessor to introduce the gas and water. The court below, against the objection of the plaintiff, admitted testimony as to the oral agreement, and the jury found for the defendant.

The theory upon which the court, doubtless, admitted the evidence, and upon which the respondent seeks to defend here such ruling, is that the case comes within those where a written agreement, given in part-performance of an oral agreement which includes the subject-matter of the written agreement and other matters not intended to be embraced in it, is held not to exclude oral testimony as to the agreement in respect to such other matters. Had the alleged agreement to bring in the gas and water been in the written lease, a breach of it would not have terminated the lease, nor absolved the defendant from the obligation to pay rent. At most, it would have been ground of an action or a counterclaim for damages. But the case does not come within the rule of those referred to. The alleged agreement was, not to put the premises in a certain condition preparatory to leasing, not to introduce the water and gas prior to the execution of the lease, or contemporaneously with it, or before the time fixed for the commencement of the term, but to do so at some indefinite time during the term. The intention was to let the premises, and they were let, just as they were, without the water and gas. The agreement referred to something to be done by the lessor during the tenancy in respect to the subject-matter of the lease, and as one of the considerations for the covenants in it on the part of the lessee, —as much so as any covenants on the part of a lessor usually inserted in leases. It was not collateral to the matter of leasing, any more than would be a promise or covenant to keep in repair. It is to be presumed that the parties inserted in the lease all the cove-

nants and promises on both sides, and that what is not in it was purposely omitted, and that what they inserted in it, in the matter of gas and water, expressed their final agreement, and all they did agree to, in reference to that matter.

Order reversed.

JOHN WYVELL vs. JOHN BARWISE and another.

April 24, 1890.

Set-Off of Judgments—Assignment.—June 22, 1888, B. recovered judgment against W., and on the same day assigned it to K., who still owns it. June 24, 1889, W. recovered judgment against B. *Held*, that the court cannot set the judgments off against each other.

Appeal by plaintiff from an order of the district court for Wadena county, *C. L. Brown, J.*, presiding, denying his motion that a judgment of the same court of \$356.20, in his favor against defendant Barwise, and the judgment of \$270.61, recovered against him by Barwise in this action, be set off against each other.

Lyman B. Everdell, for appellant.

A. G. Broker, for respondents.

GILFILLAN, C. J.¹ Appeal from an order refusing a motion to set off judgments against each other. June 22, 1888, respondent Barwise recovered judgment against the appellant, and on the same day assigned it to the respondent Katzky, who now owns it. June 24, 1889, appellant recovered judgment against Barwise. These are the judgments sought to be set off. There are other reasons upon which the court might have refused the motion, but the above statement of the facts presents one that renders the consideration of any other unnecessary. There could be no right of set-off of the judgments till both existed. When appellant recovered his judgment, Barwise was not the owner of the other. An assignee of a judgment takes it, of

¹Mitchell, J., took no part in this decision.

course, subject to the equities between the parties to it. But such equities, to affect him, must exist at the time of the assignment. He cannot be affected by those that may subsequently arise. At the time of this assignment there were no counter-judgments to be set off, and no equity of set-off could exist.

Order affirmed.

DAVID BUCHANAN *vs.* SIMON REID.

April 24, 1890.

Mortgage—Foreclosure—Redemption by Junior Lienholder.—Rule in *Pamperin v. Scanlan*, 28 Minn. 345, and *Parke v. Hush*, 29 Minn. 434, that the holder of the purchaser's interest upon a foreclosure or execution sale, in order to tack a subsequent lien to it for the purposes of redemption, must place himself in the line of redemptioners with respect to such subsequent lien, by complying with the statute, followed.

Same—Lienholding Creditor—Purchaser at Sale under Junior Mortgage.—The purchaser at the foreclosure of a junior mortgage may, within the year from the foreclosure sale, redeem from the foreclosure of a prior mortgage as "a creditor having a lien."

Appeal by plaintiff from a judgment of the district court for Polk county, where the action was tried by *Mills, J.*

White & Hewit, for appellant.

Pierce & Cromb and *P. C. Schmidt*, for respondent.

GILFILLAN, C. J. At the times of executing the several mortgages hereinafter mentioned, one Peter Borden was the owner of the real estate in this action involved. July 19, 1882, he executed a mortgage on the property, with a power of sale, to the trustees of Beloit College, which mortgage was duly recorded July 20, 1882. February 25, 1887, this mortgage was duly foreclosed under the power, and the trustees became the purchasers at the sale. The certificate of sale was recorded the same day. February 18, 1888, the trustees assigned the certificate to plaintiff, and the assignment was recorded February 29, 1888. May 23, 1885, Borden executed a mortgage on

the same property to one Sweet, which was recorded June 2, 1885. Afterwards Sweet assigned this mortgage to plaintiff, and the assignment was recorded January 28, 1886. December 28, 1885, Borden executed to the plaintiff a mortgage, with a power of sale, on the same property, which was recorded December 31, 1885. Afterwards plaintiff duly assigned this mortgage to defendant, and the assignment was recorded June 27, 1887. August 16, 1887, defendant foreclosed this mortgage under the power, and at the sale became the purchaser, bidding in the property at the full amount of the debt secured by the mortgage. The certificate of sale was recorded August 23, 1887. Plaintiff did not attempt to redeem from the foreclosure of the first mortgage, nor file any notice of intention so to do. February 24, 1888, defendant filed notice of intention to redeem from said foreclosure, and within the proper time made redemption, paying to the sheriff the amount required for redemption from that foreclosure, if he was not required to pay the second mortgage then held by plaintiff, but on account of which he did not pay anything. The sheriff executed to defendant the usual certificate of redemption, which was recorded February 28, 1888. The action is brought to have the redemption declared null, and the certificate cancelled. The court below rendered judgment for the defendant.

The appellant's propositions in regard to the redemption may be reduced to these two: *First*. If the defendant's right of redemption was that of a creditor having a lien, he could not make redemption without paying the amount of the second mortgage then held by plaintiff, who also then owned the right of the purchaser on the foreclosure of the first mortgage. *Second*. But, as defendant's debt was extinguished by the foreclosure of the mortgage held by him, at which the property was bid in for the whole amount of the debt, he was not a "creditor having a lien," and could not redeem as such; and, if regarded as an "assign" of the mortgagor for the purpose of redemption, he could redeem only within the year, and redemption by him would merely annul the sale from which he redeemed.

The first of these propositions is disposed of by the decision in *Pamperin v. Scanlan*, 28 Minn. 345, (9 N. W. Rep. 868,) followed in *Parke v. Hush*, 29 Minn. 434, (13 N. W. Rep. 668,) in which it was

held that the holder of the purchaser's interest at a foreclosure or execution sale, in order to tack a subsequent lien to it for the purposes of redemption, must place himself in the line of redemptioners with respect to such subsequent lien, by complying with the statute. Those decisions have stood so long without question that they must now be regarded as establishing a "rule of property," and they ought to be adhered to.

The other proposition presents a question not free from doubt, to wit, to which class of persons entitled to redeem, "assigns" or "creditors having liens," does the purchaser at the foreclosure of a junior mortgage belong? In *Cuilerier v. Brunelle*, 37 Minn. 71, (33 N. W. Rep. 123,) it was held that within the meaning of those sections of the statute giving the right to redeem, and prescribing how and when redemption may be made, the mortgagee in a junior mortgage, not foreclosed, is not an "assign," but is a creditor having a lien. The *status*, in respect to this, of the purchaser under a foreclosed junior mortgage, before the title under the foreclosure has passed to him, has never been decided. The matter was before the court, but not decided, in *Tinkcom v. Lewis*, 21 Minn. 132. / In the opinion in that case, Mr. Justice Young recognizes the difficulty of considering the purchaser as a creditor, but says: "On the other hand, there are equal, if not greater, difficulties in the way of holding that during the year following the sale such purchaser is an 'assign' of the mortgagor, within the meaning of section 13."

[When we have in view the general purpose of the statute giving and regulating the right of redemption,—to wit, to enable all who have interests or claims which may be cut off by a foreclosure or execution sale to save their interests or claims, so far as they may without impairing the rights of those in whose behalf such sale was made, or who purchased at such sale, it must be held that the foreclosure of a subsequent lien does not take from it the right of redemption. In the case of a junior mortgage the purchaser at the foreclosure of it is in some sense, until the mortgagor's title passes to him by expiration of the time for redemption, the successor of the mortgagee. It is true his right and interest is different in some respects from that of the mortgagee. But is the difference such as

to transfer the right (as concerns the purpose of redemption) from the class in which the mortgagee belonged before foreclosure to another class, that of "assigns?" The title of the mortgagor does not pass by the foreclosure till his right of redemption expires. Gen. St. 1878, c. 81, § 12; *Daniels v. Smith*, 4 Minn. 117, (172;) *Donnelly v. Simonton*, 7 Minn. 110, (167;) *Horton v. Maffitt*, 14 Minn. 216, (289;) *Standish v. Vosberg*, 27 Minn. 175, (6 N. W. Rep. 489.) The foreclosure sale attaches this condition to his title, that it will pass at the end of a year from the sale unless he, his heirs, administrators, or assigns redeem. The court in *Whitney v. Huntington*, 34 Minn. 458, (26 N. W. Rep. 631,) in speaking of the right of a purchaser at an execution sale pending the time for redemption, purposely and carefully refrained from giving it a designation or description. In *Lindley v. Crombie*, 31 Minn. 232, (17 N. W. Rep. 372,) it is spoken of as a right to have the title vest by lapse of time if not prevented by redemption. The lien of the mortgage is not extinguished until it merges in the legal estate when that passes by lapse of time. It has passed indeed to the purchaser, that is to the amount of the purchase price, so that if he go into possession under the foreclosure, even though it be invalid, he is regarded as a mortgagee in possession. *Martin v. Fridley*, 23 Minn. 13; *Johnson v. Sandhoff*, 30 Minn. 197, (14 N. W. Rep. 889.)

That the purchaser has a lien for the purchase price does not remove the difficulty the court found in *Tinkcom v. Lewis* in holding him a creditor having a lien. In that opinion it is said "for the mortgage debt was satisfied by the sale, and the purchaser at a mortgage sale does not become a creditor of the mortgagor in the usual sense of the term." We think however on reflection that the term "creditor" as used in the statute ought not to be construed as having the limited sense of a personal creditor. There may be a creditor so far as concerns the land alone, without the personal relation of debtor and creditor in the ordinary sense existing. Thus a mortgage might be given without any personal liability, any liability beyond the land, any right in the creditor of recourse except to the land; or a mortgage might secure the debt of a third person. In such case the mortgagee would not be a creditor of the mortgagor in the usual sense of

the word. Yet there could be no doubt that he would have the right of redemption as a creditor having a lien, within the meaning of the statute. Construing the term "creditor," as used in the statute, as including one having a right of recourse to the land for satisfaction of his claim or demand, though he may have no personal claim against the mortgagor, we think the purchaser at a mortgage foreclosure sale comes within the class of redemptioners, "creditors having liens." Those words may not accurately describe his relation to the land, but they come more nearly doing so than the word "assigns." We hold, therefore, that defendant's redemption was valid, and that by it he acquired the title passing under the foreclosure of the first mortgage.

Judgment affirmed.

MITCHELL, J. While I adhere to the views expressed by me in *Parke v. Hush*, *supra*, I concur in the result upon the ground that when defendant made redemption, the assignment from the trustees of Beloit College to plaintiff was not on record.

JOHN S. BERG and another *vs.* A. J. STANHOPE and another.

April 24, 1890.

Complaint against Two Defendants on Several Contracts.—A complaint which alleges no joint contract or promise by the defendants, but alleges the several contract or promise of each of two defendants, improperly unites several causes of action. Following *Trowbridge v. Forepaugh*, 14 Minn. 100, (188.)

Appeal by defendant Isaac Patterson from an order of the district court for Isanti county, *Hicks, J.*, presiding, overruling his separate demurrer to the complaint.

J. A. Ross and *J. L. Dobbin*, for appellant.

H. F. Barker, for respondents.

GILFILLAN, C. J.¹ Appeal from an order overruling a demurrer to the complaint. One ground of demurrer was that several causes of

¹ Mitchell, J., was absent, and took no part in this decision.

action are improperly united. The complaint contains three counts, all alike so far as obnoxious to the above ground of demurrer. Each alleges a request by defendant Stanhope to do certain work, and a promise by him to pay for it, and a separate promise by defendant Patterson to pay for the same work. No joint employment or promise is alleged. In other words, a separate cause of action against each defendant, but no joint cause of action against both, is alleged.

The case comes within the decision in *Troubridge v. Forepaugh*, 14 Minn. 100, (188,) in which it was held that the statute forbids the joinder of causes of action which do not affect all the parties. The liability of each defendant depends on the contract or promise of himself, to which the other was not a party, and by which he was not affected.

Order reversed.

GEORGE L. WILKINS vs. STATE INSURANCE COMPANY, OF DES MOINES,
IOWA.

April 24, 1890.

Fire Insurance — Payment of Premium — Unauthorized Waiver by Local Agent.—The rule that "if an agent exceeds his actual authority, and the person dealing with him has notice of the fact, the principal is not bound," applied to a case where a local agent of a fire-insurance company assumed to waive a provision in the policy that "no insurance would be binding until actual payment of the premium;" the policy itself containing a provision that none of its terms could be waived by any one except the secretary of the company.

Appeal by defendant from an order of the district court for Rice county, *Buckham, J.*, presiding, refusing a new trial after a verdict of \$322.75 for plaintiff.

M. H. Keeley, for appellant.

A. D. Keyes, for respondent.

MITCHELL, J. The defendant, an Iowa corporation, but doing business in this state, had an agent at Faribault, whose general duties

v.48m.—12

were to solicit insurance, fill up the blanks in printed policies already signed by the general officers of the company, and left in his possession, countersign and deliver the same, and collect and remit the premiums. It is undisputed in the evidence that this agent, having solicited the plaintiff for insurance on his stock, and the plaintiff being unable then to pay the premium, assumed to waive immediate payment, and to give plaintiff a temporary credit for the premium, and delivered to him the policy on which this action is brought. The agent subsequently called on the plaintiff at least twice for the premium, but the latter failed to pay; and some two and a half months after the policy was issued the property was burned, the premium being still unpaid.

The question is whether the company was bound by the act of the agent in waiving immediate payment of the premium, and giving plaintiff credit. The policy contains a provision that "no insurance shall be considered as binding until actual payment of the premium." The same rules apply to insurance companies as to any other case of agency. They are bound by all the acts of their agents within the scope of the real or apparent authority with which they have clothed them, and no farther; and it would seem well settled by the great weight of authority that, at least in the case of stock companies, a person dealing with an agent possessing the powers exercised by this agent has a right to assume, in the absence of notice to the contrary, that he has authority, pending negotiations for a contract of insurance, to waive a provision like the one quoted, and to give a short credit for the premium. But it is the undoubted right of the company, as in the case of any principal, to impose a limitation upon the authority of its agents. And it is as elementary as it is reasonable that if an agent exceeds his actual authority, and the person dealing with him has notice of that fact, the principal is not bound; and it is upon this proposition that defendant chiefly relies. There are two provisions in the policy to which he refers in support of his contention. The first is that "no officer, agent, or representative of the company, shall be held to have waived any of the terms or conditions of this policy unless such waiver shall be in-dorsed thereon." Following *Lamberton v. Conn. Fire Ins. Co.*, 39

Minn. 129, (89 N. W. Rep. 76,) which is abundantly supported by the authorities, this contains no limitation upon the authority of any class of agents, prohibiting them from waiving any of the terms or conditions of the policy. It applies alike to all representatives of the company,—executive or general officers as well as others; and, so far as it assumes to be a limitation at all, it is upon the company itself, to the effect that it can only waive the conditions of the policy in a certain way, or, rather, it assumes to provide what shall be the exclusive evidence of such waiver. This provision, therefore, will not support defendant's contention, but the other or second one does. It is as follows: "this policy is made and accepted upon the above express terms, and no part of this contract can be waived except in writing signed by the secretary of the company." The words "policy" and "contract" are evidently here used as synonymous, and the latter clause clearly means that none of the terms of the policy can be waived by any one except the secretary. Conceding that this would not prevent the company itself, through its board of directors, or other body representing it in its corporate capacity, from waiving any of the terms or conditions of the policy, yet it is a plain declaration that no representative of the company but the secretary can do so, and hence that no local agent can do it. This, being in the policy itself, was notice to plaintiff that this agent at Faribault had no authority to waive the condition that no insurance would be binding until payment of the premium. It is no answer to say that he did not read the policy, and hence did not know what it contained. He was bound to know this; and, by accepting the policy, he is estopped from setting up powers in the agent in opposition to the express limitations contained in it. For this reason, we think the court erred in charging the jury that, if the policy was delivered by the agent to the plaintiff with the intention of giving him a temporary credit for the premium, this would be a delivery that would bind the company so that the policy would be operative and in force.

Order reversed.

**ALBERT H. KENYON and another vs. WILLIAM H. SEMON, impleaded;
etc.**

April 24, 1890.

Complaint—Designation of Parties by Initials.—The fact that the parties to an action are designated by the initials of their Christian names is no ground for the dismissal of the complaint, or reversal of the judgment. The proper remedy is by motion to require the complaint to be corrected or amended.

"A. H. Kenyon and A. T. Morse, partners as Kenyon & Morse," brought this action in the municipal court of Minneapolis against "J. S. Semon and W. H. Semon," and had judgment by default, on October 28, 1889, for \$175.18. On October 26th, William H. Semon, one of the defendants, appearing specially for the purpose of the motion only, served notice of a motion, to be made November 5th, to dismiss and strike out the complaint because it does not specify the Christian names of any of the parties except by the initial letters thereof. The motion was made on his own affidavit specifying the full Christian name of each of the parties. He appeals from the judgment and from an order denying his motion.

N. H. Miner, for appellant.

C. E. Conant, for respondents.

MITCHELL, J. The practice of designating the parties, either plaintiff or defendant, by the initials of their Christian names, is irregular, and has been more than once disapproved by this court; but it is no ground for the dismissal of the complaint or for a reversal of the judgment. The proper remedy, in such a case, is by motion to require the complaint to be amended or corrected in that respect. The other question sought to be raised is not involved in this appeal, at least on the present record.

Order and judgment affirmed.

MELVILLE S. NICHOLS vs. GEORGE C. HOWE.**April 24, 1890.**

Parol Evidence of Contents of Telegram.—Refusal to strike out oral evidence of contents of telegram, not shown to be lost or destroyed, *held* error.

Plaintiff brought this action in the district court for St. Louis county, on March 30, 1889, alleging, in his amended complaint, that as a commission merchant in Chicago, he sold for defendant, at his request, 20,000 bushels of wheat at \$1.28½ per bushel, on May 1, 1882, and bought for him, at his request, 20,000 bushels of wheat, at \$1.35 per bushel, on May 26, 1883, and that the defendant promised to pay the amount expended by plaintiff for the purchase in excess of the amount realized upon the sale, being \$1,275, for which sum, with interest from May 26, 1883, judgment is demanded. The defence was a general denial and the statute of limitations. At the trial before *Stearns, J.*, it appeared that the sale was of "July wheat"—that is, of wheat deliverable in July, and was made by plaintiff, in his own name, at the Chicago board of trade, of which plaintiff was a member. The plaintiff, as a witness on his own behalf, having testified that the contract of sale was made by defendant's order, (giving the terms of the order,) was then asked, "Was that order by mail, or by telegram, or in person?" and answered, "It was by telegram." The defendant moved to strike out the answer on the ground that the telegram itself is the best evidence. The motion was denied, and an exception taken. There was also evidence that in June or July, 1882, the defendant (who then and until 1887, resided in Bradford, Pa.) ratified the sale, and that the contract of sale by plaintiff in his own name was in accordance with the custom at the board of trade, and bound plaintiff personally to its performance. There was also evidence that the contracts for delivery of wheat in July, 1882, that were not fulfilled by specific delivery of the property, were referred, under the rules of the board, to a committee of five to determine the measure of damages by reason of the default on delivery, and that in October, 1882, the committee computed the dam-

ages on the basis of \$1.35 per bushel, and that the plaintiff by defendant's direction, paid the damages computed on this basis, being \$1,275, the amount claimed in the complaint. The defendant's contention was that the transaction was not a *bona fide* sale of wheat to be actually delivered in July, 1882, but was a mere gambling deal, without any intention to deliver or receive the grain, but merely to pay and receive the difference between the contract price and the market price at the time for delivery, and the jury was instructed that in such case the plaintiff could not recover, if such intention were shared by both parties; but if the plaintiff supposed that he was to sell, and in good faith did sell, wheat to be actually delivered, and with no intention of gambling, a recovery would not be defeated by the mere fact that the defendant intended it to be a gambling transaction. The plaintiff had a verdict for the full amount claimed, and the defendant appeals from an order refusing a new trial.

White & Reynolds, for appellant.

C. H. Hamilton and *L. H. Zastrow*, for respondent.

GILFILLAN, C. J. Whether the plaintiff was employed by defendant to sell the wheat deliverable in July, 1882, and whether it was intended between them to be an actual, *bona fide* contract for the sale of the wheat, or a mere gambling upon a rise or fall in the price of wheat during July, were, on the evidence, questions for the jury; and they were fairly left to them by the court. On the evidence, it is immaterial that the cause of action arose immediately on the default to deliver the wheat in July, 1882, or only the following year, when plaintiff settled with the purchasers; for in neither case did the statute of limitations bar the action. The defendant, at the commencement of the action, had resided in this state but about two years; and it does not appear that the cause of action was barred in the state where it arose. Assuming the sale to have been *bona fide*, the damages for its breach were to be measured by the price of wheat in July, 1882. The price in 1883 was immaterial. As the business was to be done at the board of trade in Chicago, it was, there being no express agreement to the contrary, to be done subject to the usages and rules of that body,—among them, that providing for arbitrators to determine what was to be taken as the price

of wheat, during any period, in settling contracts for sale or purchase deliverable during such period.

As to all the foregoing matters the action of the court below was correct, but it committed an error in the matter of evidence. The fact of authority from defendant to plaintiff to sell the wheat was in issue, not only in the pleadings, but in the evidence. The error we refer to consisted in allowing to stand, against a motion to strike out, an answer of a witness giving, in effect, the contents of a telegram claimed to have been sent by defendant to plaintiff, containing an order to sell the wheat. The telegram was not produced, nor was it shown to have been lost or destroyed. The question answered did not indicate that the answer might give, in effect, the contents of the telegram; so that the defendant had no opportunity to make the objection until the question was answered. For this reason there must be a new trial.

Order reversed.

MILWAUKEE HARVESTER COMPANY *vs.* P. H. FINNEGAN and another.

April 24, 1890.

Joint Agents—Liability for Each Other—Account Rendered by One.—

Where two or more persons contract to execute a private agency together, they are jointly liable each for the acts of the other, and are, as to the principal, *quasi* partners in the agency business, although, as between themselves, the one has no interest in the business, which is wholly transacted by the other. An account, within the scope of such business, rendered or stated by the one during the continuance of the *quasi* partnership, is equivalent to an account rendered by the firm, and is equally binding on both.

Appeal by plaintiff from an order of the district court for Sibley county, *Edson, J.*, presiding, refusing a new trial after verdict in favor of defendant Patrick Duffy, who alone appeared and defended.

R. A. & C. F. Irwin, for appellant.

W. H. Leeman, for respondent.

MITCHELL, J. We think the trial judge, in his charge to the jury, failed to distinguish between what will constitute a partnership of parties *inter se*, and what constitutes a partnership as to third persons, and also overlooked the rules governing the liability of joint agents or factors to their principal; and that, as a probable consequence of these errors, the verdict is against the evidence. In the spring of 1887 the plaintiff as one party, and the two defendants jointly as the other party, entered into a contract by which the former appointed the latter its joint agents for that season to handle and sell its farm machinery on commission in certain counties in this state, the defendants agreeing to sell it for a stipulated compensation, and to return the proceeds of sales (less their commissions) to the plaintiff, the cash as soon as received, and the notes whenever called for, and to be ready to make a full and complete settlement for the season's business by October 1st. The contract was renewed, or, rather, a similar contract was made, in the spring of 1888, for the following season. Pursuant to these contracts, the plaintiff shipped to defendants, at Shakopee, in 1887 and 1888, a large number of machines; which, however, at Finnegan's request, were consigned to him individually, he giving as a reason that Duffy did not want it known that he was interested in the business. The business was managed exclusively by Finnegan; the defendant Duffy, who resided on a farm some distance from town, taking no active part. Indeed, it appears from the evidence that, as between Finnegan and Duffy, the latter in fact had no interest in the business, but merely executed the contract, and assumed the liability of joint agent with Finnegan, in order to give him credit, and enable him to secure the benefits of an agency to handle plaintiff's machines. It does not appear that plaintiff knew this fact, but, for reasons which will be suggested hereafter, it is entirely immaterial whether it did or not. In the fall of 1887 plaintiff's agent and Finnegan had a full accounting and settlement for the season's business, at which it was ascertained and agreed that there was a balance of \$325 due the plaintiff. In the fall of 1888 they had a similar settlement and accounting, at which it was ascertained and mutually agreed that there was due the plaintiff, including the amount found due the previous year, a balance of

\$703.40. Duffy personally took no part in these settlements, and in fact knew nothing about them. In this action against the two defendants to recover this balance as an account stated, Duffy, who alone answered, did not attempt to surcharge this accounting; his defence on the trial being that he was not in fact a partner with Finnegan, and had no interest in the business, and, not having personally taken any part in the accounting, there was as to him no account stated. The court instructed the jury that the whole case turned upon the question whether Finnegan and Duffy were partners; that if Duffy was not a partner, but simply surety for Finnegan, the plaintiff could not recover, for the reason that the action was upon an account stated, and that Duffy took no part in the settlement, and never agreed to any account stated. In view of the evidence, this was equivalent to instructing the jury to find for the defendant, and was clearly error.

It is familiar law that where two or more persons undertake to execute a private agency together, they are jointly liable each for the acts of the other; nor is it any defence that one of them wholly transacted the business with the knowledge of the principal. Each is liable for the whole, if they jointly undertake the agency, notwithstanding an agreement between themselves to the contrary, or that one shall have all the profits. As to all matters within the scope of this agency, Duffy and Finnegan were, as to plaintiff, *quasi* partners. The fact that Duffy had no interest in the business, but merely lent his name for Finnegan's benefit, even if known to plaintiff, would not affect his liability or alter his relation to plaintiff. By express contract with plaintiff, he voluntarily assumed the obligations of joint agent with Finnegan, and of a *quasi* partner with him in the business which was the subject of the contract. The fact that he did so without having, as between himself and Finnegan, any interest in the business, did not induce credit any the less. On the contrary, the very fact that he contracted to assume these relations and obligations constituted the very basis of the credit given to and the trust confided in him and Finnegan as plaintiff's joint agents. Whart. Ag. § 142; *Godfrey v. Saunders*, 3 Wils. 73; *Brown v. Leonard*, 2 Chit. 120. Therefore, upon the undisputed facts, Duffy and

Finnegan were, as to plaintiff, *quasi* partners in this agency business. The statement of this account by Finnegan was within the scope of this business,—in fact was expressly required by the terms of the contract,—and it was stated during the existence of the *quasi* partnership. An account rendered or stated by one partner, under such circumstances, is equivalent to an account rendered by the firm. 1 Lindl. Partn. *128. Hence, unless surcharged, the account stated by Finnegan is binding on Duffy, although as between themselves they might not have been partners.

Order reversed.

ABRAHAM LIEBERMAN *vs.* ABRAHAM ISAACS and another.

April 24, 1890.

Executory Sale—Refusal to Deliver—Demand.—Findings held to be justified by the evidence.

Appeal by defendants from an order of the municipal court of Minneapolis, refusing a new trial after a trial by the court, and judgment of \$115 ordered for plaintiff.

Frederick B. Lathrop, for appellants.

Merrick & Merrick, for respondent.

MITCHELL, J. Action to recover damages for the breach of a contract for the sale of a quantity of old iron by defendants to plaintiff, and the question is whether the decision of the trial court was justified by the evidence. It will be found, upon an examination of the evidence, that the whole case turned upon the question when, according to the agreement of the parties, the property was to be delivered and paid for. It is unnecessary to consider how far, if at all, oral testimony was admissible to explain or supplement the written memorandum of the bargain executed by the parties on July 26, 1889, as such evidence was introduced by both parties without objection. The original agreement, which was oral, was that the iron was to be delivered on the cars at Minneapolis on Saturday, July 27th, and

the following Monday, and paid for on delivery. Subsequently the plaintiff's agent, with whom the business was transacted, was called by telegram to Chicago, and he informed the defendants that he could not attend to the shipment of the iron until his return, and, in view of this, the written memorandum referred to was executed. Both parties agree that the time for the delivery of, and payment for, the property was postponed until the return of plaintiff's agent from Chicago, but they flatly contradict each other as to when this was to be. Defendants swear positively that it was expressly understood that the agent was to return and receive and pay for the iron on the following Monday or Tuesday, (July 29th or 30th.) On the other hand, the agent swears in substance that he told defendants that he would not return for two or three weeks, and that it was in view of this delay that the written memorandum of the bargain was made. This was the pivotal question in the case, for the agent did not return until August 12th, when he found that defendants had previously disposed of most of the iron to other parties. If the agreement was that the property was to be taken and paid for by plaintiff not later than July 29th or 30th, of course defendants were not bound to keep it for him until August 12th. On the other hand, if, as plaintiff claimed, it was the understanding that he was not to come for the property for two or three weeks from July 26th, then the trial court would be justified in finding, as he in fact did, that August 12th was within the terms of the contract, and that defendants broke it by disposing of the property prior to that date. The court found on this issue in favor of plaintiff, and, in view of the conflict of testimony, we cannot say that his finding is not justified by the evidence. This is decisive of the case; for if, within the life of the contract, defendants wrongfully disposed of the property, this rendered unnecessary a formal demand for it, or tender of payment by plaintiff, which, under the circumstances, would have been a useless ceremony.

Order affirmed.

JULIUS GROSSE and others *vs.* MARY A. COOLEY.

April 24, 1890.

Real-Estate Broker—Commission—Solvency of Purchaser Presumed.

Where a real-estate broker has procured a purchaser for the property of his principal, the solvency and ability of such purchaser to perform the obligations of his contract will be presumed until the contrary is proved.

Action brought by plaintiffs in the municipal court of Minneapolis, to recover \$500 as their commission on a sale of real estate negotiated by them for defendant. Upon trial by the court judgment was ordered and entered for plaintiffs for the amount claimed, and the defendant appealed.

E. E. Cooley, for appellant.

Gray & Pulliam, for respondents.

MITCHELL, J. We fail to discover any prejudicial error in the rulings of the trial judge, and we think the evidence fully sustains the findings. It is sufficiently established that the defendant agreed with plaintiffs to pay them \$500 commission if they would procure a purchaser for a certain tract of real estate at a specified price; that they did find such a purchaser at that price and on terms satisfactory to defendant; that such purchaser executed a written contract, agreeing to buy the land on those terms, and paid \$200 earnest-money on the bargain. There is no evidence that this purchaser has ever refused to carry out his bargain, or that he was unable to do so. This was sufficient to establish plaintiffs' right to recover. A real-estate broker is entitled to his commission under a contract like this when he produces a purchaser able, ready, and willing to buy on the owner's terms. The main point urged by appellant is that the burden was on plaintiffs to show that the proposed purchaser was solvent, and able to carry out the bargain. The rule in this state is otherwise. Solvency is always presumed until insolvency is proved. The presumption is that the purchaser was able to perform the obligations assumed by his contract. *Goss v. Broom*, 81 Minn. 484, (18 N. W. Rep. 290;) *Crevier v. Stephen*, 40 Minn. 288, (41 N. W. Rep. 1039.)

48	188
45	84
43	188
35	152

His willingness to do so in this case was evidenced by his executing a binding contract to that effect, and paying earnest-money. The plaintiffs certainly made out a *prima facie* case.

There was no error in admitting in evidence the contract, Exhibit A. Although plaintiffs might have had no authority to sign such a contract of sale in behalf of defendant, yet, being also signed by the proposed purchaser, it was certainly competent evidence of the fact that plaintiffs had procured a purchaser for the property on defendant's terms. The most that can be said against the admission of Exhibit B (the receipt of defendant's agent and uncle to plaintiffs for the earnest-money) is that it was immaterial, but, if so, its admission was, under the circumstances, error without prejudice.

Judgment affirmed.

ORLO ROGERS vs. WILLIAM K. GASTON.

April 25, 1890.

Attorney and Client — Purchase by Attorney Sustained.—Where an attorney-at-law was employed to foreclose a mortgage, and, upon examining the title, discovered that the mortgagor owned, and therefore mortgaged, only an undivided half interest in the mortgaged premises, and thereupon duly notified the agent of his client, through whom he was employed, of the state of the title, and, under his instructions, bid off the premises at one-half their supposed value, and, for two years after his relations as an attorney in the matter had been closed, the mortgagee had not purchased the outstanding interest, or proposed to do so, *held*, that it was not presumptive evidence of bad faith in the attorney, nor a breach of his privilege as such, that he then purchased the same for himself; and the court will not, after that length of time, solely on the ground of his former relations to the mortgagee, interpose to adjudge him a trustee of the land for the latter.

Plaintiff brought this action in the district court for Ramsey county, praying that a quitclaim deed of lot 5, of block 7, in Warren & Rice's addition to St. Paul, executed by Addison C. Miller and wife

to defendant under the circumstances stated in the opinion, be adjudged void as to plaintiff, and that plaintiff's title to the lot be quieted, etc. The action was tried by *Kelly, J.*, who ordered judgment for defendant, which was entered, and the plaintiff appealed.

Merrill & Willett, for appellant.

Wm. K. Gaston, respondent, *pro se*.

VANDEBURGH, J. One Turrell had mortgaged to plaintiff's wife lot 5, in block 7, in Warren & Rice's addition to St. Paul, together with other property. After her death, plaintiff was appointed her administrator; and defendant, who is an attorney-at-law, was employed by the agent of plaintiff to foreclose the mortgage. Upon procuring an abstract of the title to the mortgaged premises, it was found that Turrell owned only an undivided half of the lot 5, above mentioned, when he executed the mortgage. Whereupon, before the foreclosure, the defendant notified the agent of this fact; and, under his direction, it was bid in for half its value, and the mortgaged premises, taken together, were bid in for sufficient to satisfy the entire mortgage debt, pursuant to the instructions of the agent of plaintiff. The mortgage sale took place February 19, 1884. It will be observed that the plaintiff had no legal or equitable claim or interest in the undivided half not owned by Turrell, so that no suit or other proceedings which the defendant, as his attorney, might undertake or advise, would avail to perfect the title thereto in the plaintiff, which could only be procured by purchase; and of this fact plaintiff's agent, with whom alone defendant communicated, was advised. Upwards of two years after the foreclosure, and long after defendant's relations with plaintiff as his attorney had ceased, defendant purchased the outstanding title to the undivided half not covered by the plaintiff's mortgage, and claims to be owner thereof.

The plaintiff's contention is that the defendant's purchase of the lot for himself, without first ascertaining the wishes or intentions of the plaintiff in respect to it, was a breach of his privilege, and that he should be declared to hold the same in trust. But this, we think, cannot be sustained. The defendant dealt altogether with the agent of plaintiff, whom he advised of the condition of the title to one-half of the lot, and who informed plaintiff thereof. The agent had suffi-

cient information to enable him to advise the plaintiff intelligently in the premises, and there is no evidence of collusion between the agent and the defendant; so that, we think, after waiting a reasonable time, the defendant would be at liberty to purchase the property. It will be remembered that the title was not the subject of litigation, and that it was no part of defendant's duty as an attorney to procure the outstanding title, and the mortgage was fully satisfied by the sale of the rest of the mortgaged premises. But, since the information as to the title came out in the course of his professional employment, it was undoubtedly his duty to notify the plaintiff or his agent, and give him sufficient time and opportunity to protect his interest by purchasing the outstanding title, if he desired to do so. We cannot say that this was not done in this case, or that ample time and opportunity had not been given plaintiff to act in the premises. The courts, however, will scrutinize such transactions closely, and an attorney cannot well be too cautious and scrupulous in his conduct in making a purchase under such circumstances.

Judgment affirmed.

BYRON G. SEGOG *vs.* JOHN H. ENGLE.

April 25, 1890.

Garnishment—Excessive Judgment by Default—Remedy of Garnishee.

If a garnishee suffers judgment to go against him upon default of his appearance, his remedy must be taken in the same proceeding. If it turns out that the judgment is in excess of the amount due from him to the principal debtor, he cannot, after satisfying the judgment, seek indemnity from the latter in a suit against him.

Appeal by plaintiff from an order of the municipal court of Duluth, sustaining a demurrer to the complaint in an action for \$111.68.

Sherwood & Powell, for appellant.

Mahon & Howard, for respondent.

VANDEBURGH, J. In an action against this defendant, the plaintiff was summoned as a garnishee, and judgment was thereafter duly

recovered against him upon default of his appearance to make disclosure, which judgment he was thereupon compelled to pay; and he now brings this action to recover the amount thereof of the defendant as money paid out for him, on the ground that he did not, as he alleges, in fact owe the defendant anything when the judgment was recovered against him as such garnishee. The action cannot be maintained. The plaintiff's remedy was exclusively in the proceeding in which the judgment was rendered. He is as effectually concluded by the judgment, as respects the question of his indebtedness to the defendant, as if it had been taken upon his confession or admission, upon full disclosure, of the fact of such indebtedness. It was his own act or negligence, for which the defendant is not responsible, and there is no implied obligation on his part to indemnify the plaintiff garnishee. The judgment remaining in full force, under the circumstances of the case, the plaintiff, in legal contemplation, simply satisfied his own debt, established on his own admission.

Order affirmed.

A. C. STAPP vs. STEAMBOAT CLYDE.

April 25, 1890.

Lakes wholly within State — U. S. Admiralty Jurisdiction. — Inland lakes lying within the limits of the state are not navigable waters of the United States, and suits to enforce a lien against boats or vessels thereon are not within the admiralty jurisdiction of the United States.

Same—State Law for Creating and Enforcing Liens against Vessels for Supplies.—It is competent for the legislature of the state to create liens upon boats and vessels navigating such inland waters for supplies, etc., and to enact reasonable rules and regulations prescribing the mode of their enforcement.

Same—Act held Constitutional.—As to such claims, the jurisdiction of the state court is not impaired by the acts of congress; and chapter 83, Gen. St. 1878, is constitutional.

Appeal by plaintiff from a judgment of the district court for Hennepin county, entered pursuant to an order of *Smith, J.* The action

43	199
44	511
43	193
52	144

was commenced by attachment pursuant to Gen. St. 1878, c. 83, to enforce a claim of \$190.65, for coal furnished, and the ground of decision was that the statute is unconstitutional, this objection having been taken by H. Trumbull, owner of the steamboat, appearing specially to object, on that ground, to the jurisdiction of the court.

A. B. Choate, for appellant.

E. C. Betts, for respondent.

VANDEBURGH, J. This action is brought to enforce a lien for supplies furnished the Clyde, a steamboat navigating the waters of Lake Minnetonka, in this state. The owner appeared and demurred to the complaint, which was sustained on the ground that the statute of this state authorizing such proceedings against boats and vessels is unconstitutional. Two questions are to be considered: (1) Whether, in such cases, the jurisdiction of the state courts is limited to common-law remedies in form; and (2) whether the proceedings authorized by the statute in question constitute due process of law.

1. The inland lakes lying wholly within the limits of the state are not navigable waters of the United States, and suits to enforce a lien for supplies, etc., against boats and vessels thereon are not within the admiralty jurisdiction of the district courts of the United States; and such claims are not maritime, within the meaning of the acts of congress on the subject. A maritime claim cannot be enforced in the state courts by any other than a common-law remedy, under the judiciary act of 1789, which confers exclusive jurisdiction in such cases upon the United States district courts. Section 563, subsec. 8, Rev. St. U. S. (p. 95,) includes a provision "saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it." This saving clause, of course, has reference to cases of admiralty and maritime jurisdiction; and the suitor is given the chance, in such cases, to pursue his remedy in admiralty, or avail himself of his common-law remedy *in personam*, which he may do in the state courts. *Baird v. Daly*, 57 N. Y. 249. But as to claims not in their nature maritime the state jurisdiction is not impaired, and the act referred to imposes no restriction upon the power of the states to prescribe such forms of procedure for their collection as may be deemed appropriate and necessary. *Brook-*

man v. Hamill, 43 N. Y. 554. See *The Hine v. Trevor*, 4 Wall. 555, 1 West. Jur. 246, note; *The Belfast*, 7 Wall. 624, 644, 645. In the latter case, Justice Clifford says: "Authority does not exist in the state courts to hear and determine a suit *in rem* in admiralty, to enforce a maritime lien. Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port; and, in respect to such contracts, it is competent for the states, under the decisions of this court, to create such liens as their legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement." Whatever may be the ultimate decision of the courts as respects the exception in favor of home ports upon navigable waters of the United States, there can be no doubt of the application of the principle just announced to the case at bar.

2. Gen. St. 1878, c. 83, authorizing actions against boats and vessels, subjects every boat or vessel used in navigating the waters of this state to a liability for debts contracted by the owner, master, agent, or consignee, for supplies furnished for the use of such boat or vessel, etc., and authorizes a complaint against such boat or vessel to be filed with the clerk of the district court of the proper county. A warrant of attachment then issues, directing the seizure of such boat, which is to be served and returned as other writs of attachment; and, upon the return of the warrant, proceedings follow against the boat or vessel as if the action had been instituted against the person on whose account the demand accrued. The master, agent, owner, or consignee may appear and answer the complaint on behalf of such boat or vessel. As respects the owner and those representing him, all of whom may appear and answer, there is no question, we think, but that the statutory provisions of this chapter are sufficient to constitute due process of law. The actual seizure and attachment of the property is presumptively notice of the proceedings to the owner, and, of course, gives jurisdiction of the subject of the controversy proceeded against. It is not necessary to determine, in this case, whether such seizure is notice to the whole world, or whether the proceedings and sale would be attended with the inci-

dents of a suit in admiralty. It is enough, for the purposes of this case, that, as against the owner, it is competent for the legislature to provide for liens in such cases, and prescribe the procedure adopted for their enforcement. Wap. Proc. in Rem., § 65, and cases. It is for the legislature to determine, in such cases, the manner in which notice should be given to the parties in interest. "It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend," and that "it is not impracticable for him to do so by the use of such reasonable efforts as the owners of property may generally be supposed to be capable of." *Happy v. Mosher*, 48 N. Y. 313; *Miller v. Town of Corinna*, 42 Minn. 391, (44 N. W. Rep. 127.)

Judgment reversed.

HIRAM O. WELLER *vs.* GEORGE H. HAMMER.

April 25, 1890.

Judgment by Default—Successive Motions for Relief on Same Grounds.

Where no new facts have arisen, a motion cannot be renewed without leave, nor successive motions made for relief which might properly be included in the first motion.

Same—Order Denying Motion—Review on Appeal.—An order denying a motion for leave to answer after default will not be reviewed on appeal, except for abuse of discretion.

Appeal by defendant from an order of the district court for Ramsey county, *Brill, J.*, presiding, denying his motion to set aside a judgment of \$348.12, entered on failure to answer, and for leave to serve an answer.

Chapin & Sauer, for appellant.

John L. Townley, for respondent.

VANDEBURGH, J. The defendant, after the plaintiff had taken judgment as upon default, moved the court to set aside the judgment,

43	196
49	567
43	195
178	482

upon affidavits showing that the plaintiff had agreed to extend the time for answering, and that an answer had been served in time. This motion was denied, it appearing, among other things, that there was no written stipulation, and no legal service of an answer. The present motion was made to set aside the judgment, and for leave to answer, upon substantially the same facts, except that the affidavit shows that defendant's counsel "understood" plaintiff's attorney to grant such further time to answer. This motion was also denied.

1. Upon the record, there was no abuse of discretion in refusing the relief asked.

2. The defendant should have asked the additional relief on the first motion, or obtained leave to renew the motion, no new facts having arisen.

Order affirmed.

43	196
49	461
43	196
67	182

STATE OF MINNESOTA *vs.* WILLIAM H. ADAMSON.

April 26, 1890.

Forgery—Alteration of Chattel Mortgage after Filing.—Under an indictment for forgery in the second degree, (Pen. Code, § 398, subd. 2,) committed by inserting in a chattel mortgage a description of property not originally included therein, it is not a defence that the mortgage was on file as a matter of public record at the time of the forgery, so that the act may have constituted also the offence of mutilating or altering a public record.

Same—When Mortgage had been Paid.—Such forgery may be committed and constitute an offence although the mortgage had in fact been paid.

Same—Indictment—Sufficiency of.—It is not necessary, under the Code, to allege the person intended to be defrauded, nor the value of the property thus added to the mortgage.

Trial—Improper Remarks of Counsel.—Improper remarks of counsel to the jury in the course of the trial are to be shown by a settled case or bill of exceptions, and not by affidavit. The refusal of the court to grant a new trial for such cause *held* not an abuse of discretion.

Same—Former Conviction of Witness, how Proved.—The former conviction of a witness for crime may be shown, under the Code, by his cross-examination.

Same—Evidence to Explain Conduct of Witness.—Evidence in explanation of the conduct of a witness *held* admissible to rebut an inference, suggested by his conduct, as to the truthfulness of his testimony.

Same—Insufficient Exception to Charge.—Several distinct requests for instruction to the jury having been presented to the court, most of which were in substance embodied in the general charge, and one of which was erroneous, an "exception to the refusal of the court to charge the jury as requested" is not sufficient to entitle the party to a review as to the refusal of any of the specific requests.

New Trial—Misconduct of Juror.—The refusal of the trial court to grant a new trial sustained, although there was proof of the fact that a juror, in the course of the trial, when going to his home at night, went into a saloon with another person, and drank whiskey.

Immaterial evidence properly excluded.

Evidence *held* sufficient to justify the verdict.

Appeal by defendant from a judgment of the district court for Hennepin county, and from orders by *Hooker, J.*, refusing a new trial and denying a motion in arrest of judgment. At the trial it appeared that after the making of the mortgage and before the date of the alteration which defendant was charged with making, the property covered by the mortgage as altered was sold by the mortgagor to one Woodward. The latter, called as a witness by the state, admitted on cross-examination that, at a date later than that of the alleged alteration, the defendant brought replevin against him for all the property described in the mortgage as altered, and that he made no defence, and the defendant recovered judgment. On his redirect examination, he was permitted to testify (defendant objecting and excepting) that his failure to defend was owing to his want of means to employ an attorney. The nature of the prosecution and the other exceptions taken are stated in the opinion.

Merrick & Merrick, for appellant.

Moses E. Clapp, Attorney General, and *Robert Jamison*, for the State.

DICKINSON, J. The defendant was tried and convicted upon an indictment charging the crime of forgery in the second degree, under the sixth paragraph of subdivision 2 of section 398 of the Penal Code. The forgery charged consisted of the inserting in a chattel mortgage, which had been executed by one Norris to one Charles E. Adamson, of a description of certain personal property which had not been embraced in the mortgage as given, so that the property thus added appeared to be a part of the property mortgaged. It is claimed that the allegations in the indictment do not show the crime of forgery in the second degree to have been committed, but that, if any offence is shown, it was the forging or mutilating of a public record, for the reason that the mortgage had been filed for record. That the mortgage had been thus made a public record is no reason why the act charged would not be forgery, and come within the terms and intent of the statute above cited.

Again, it is urged that the indictment is insufficient for the reason that it is not alleged that the mortgage was unsatisfied and in force at the time of the commission of the alleged offence, nor whom it was intended to defraud. We deem the indictment sufficient. The statute declares that a person is guilty of forgery in the second degree who, "with intent to defraud, forges * * * an instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged, or diminished, or in any manner affected, or by which any rights or property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased, or diminished, or in any manner affected, * * * by which false making, forging, altering, or counterfeiting any person may be bound, affected, or in any way injured, in his person or property." It was not essential, to constitute a crime under this statute, that the mortgage forged should be still in force at the time of the forgery. It would be enough that rights or property be or purport to be "or to have been" created or affected. Such is the statute, and it is easy to conceive that the mortgagor might be injured by such a forgery, even though the debt had been paid. An illustration of such a case may be suggested. One owning a horse and a

cow mortgages the horse to another, and afterwards, during the existence of the mortgage, sells the cow. After the payment of the mortgage, but while the instrument remains on record, the mortgagee forges and inserts in the instrument a description of the cow, so that upon the face of the instrument it appears that the cow was embraced in the mortgage as given. Then the mortgagee institutes criminal proceedings against the mortgagor for having sold mortgaged property during the existence of the mortgage. The forged instrument would be *prima facie* proof of a fact to be established in the course of such a prosecution; that is, that the cow had been mortgaged. Again, the mortgagor might be injured by such a forgery in another way. It would impose an apparent incumbrance upon personal property which he in fact had never incumbered.

As to the absence of an averment as to the particular person intended to be defrauded, it is enough to refer to section 532 of the Penal Code, subd. 5, which expressly provides that no such averment is necessary.

It was not necessary to allege the value of the property described in the alleged forged interlineation. Even though there had been no such property in existence, the act complained of would have constituted forgery under the statute above recited.

It is assigned as error that the county attorney, in addressing the jury, used improper language concerning the defendant, to the effect that, if his character had been put in issue, he might not have come out any better than some others, with allusion to the "stench" that might have been created if his character had been discussed. But it is not alleged in the settled case that the county attorney used the language attributed to him. What is claimed to have occurred was a part of the proceedings at the trial, and in the presence of the court, and, to be the subject of review, should be presented in a case or bill of exceptions settled by the court, and not by affidavits. However, as the counsel for the state does not refer to this defect in the case, we will say that we deem the refusal of the court to grant a new trial for the cause alleged to have been not an abuse of legal discretion. *Watson v. St. Paul City Ry. Co.*, 42 Minn. 46, (43 N.W. Rep. 904.)

On cross-examination of a witness for the defendant the question was allowed as to whether he had been convicted of "a crime" in the municipal court of Minneapolis the spring before this trial. This was not error. *State v. Sauer*, 42 Minn. 258, (44 N. W. Rep. 115.) Section 531 of the Penal Code provides, with respect to a witness, that a conviction of any crime may be proved for the purpose of affecting the weight of his testimony, "either by the record or by his cross-examination." There was no error involved in the fact that the proof did not extend so far as to show the precise nature of the crime of which the witness admitted his conviction. If the defendant desired that to be shown, he was at liberty to offer further proof.

There was no error in receiving the testimony of the witness Woodward upon his redirect examination, stating the reason why he did not defend in the proceedings to foreclose this mortgage. The evidence was proper to rebut the inference (suggested by the proof on cross-examination, that he did not make any defence) that his testimony as to having discovered the forgery was untrue, because self-interest would naturally have prompted him, he having purchased the mortgaged property, to defend against the taking, if in fact he had discovered the forgery. Steph. Dig. Ev. c. 2, art. 9.

The court refused to receive in evidence a copy of the mortgage certified by the city clerk as a copy on the 9th of March, 1889, showing that at that time the clause alleged to have been forged was in the instrument. We see no error in this ruling. There was no controversy as to the fact that this clause was found to be in the mortgage at about that time. That had already been shown on the part of the state by the testimony of Norris, the mortgagor. The evidence, if received, would have had no probative force as to the issue whether the clause in question was a part of the instrument when it was executed, or was at some subsequent time inserted by the defendant.

The defendant submitted several specific requests for instruction to the jury. As to all excepting the sixth and eighth of these, there can be no question but that the substance of the requests was embodied, and well presented to the jury, in the general instructions of the court; and it would seem that the court intended, also, to present

the substance of the eighth request, which was to the effect that the jury should consider the circumstances under which the forgery was claimed to have been committed, which circumstances are recited in the request. But, even if the court ought to have been more specific in alluding to the circumstances of the case, as embodied in the request, the defendant's assignment of error cannot be sustained under his general "exception to the refusal of the court to charge the jury as requested." *Shull v. Raymond*, 23 Minn. 66. This exception, applicable alike to all the requests, (most of which, although not given in form as asked, had been embraced, in substance, in the general charge, and one of which, the sixth, was erroneous,) was not calculated to call the attention of the court to its failure to state the full substance of this eighth request. The sixth request involved an error which justified a refusal to present it to the jury. It involved the erroneous proposition that there could be no conviction unless it should be found that by the forgery the mortgagor, Norris, "was bound, affected, and injured in his property;" the conjunction "and" being used in the place of the disjunctive "or" found in the statute. A conviction would be justified though the mortgagor was not bound by the alteration alleged.

The evidence was sufficient to justify the verdict. The defendant expressly admitted that the writing of the instrument, including the words alleged to have been forged, was his own. There was evidence that this clause was not in the mortgage when it was executed; and the description of the mortgaged property, as it now appears, seems to have been written with two or more kinds of ink. It is quite unnecessary to refer to other evidence in the case.

Voluminous affidavits were presented upon the motion for a new trial relating to the alleged misconduct of a juror, and to the *animus* and credibility of witnesses on the part of the state. We will only say of these, speaking generally, that the matters alleged were so opposed by affidavits on the part of the state that the determination by the trial court should not be disturbed. The fact was established, however, that a juror, while going to his home in the company of another person, in the course of the trial, went with him into a saloon, and took one drink of whiskey. However repre-

hensible this may have been, we are not to consider, in view of the affidavits presented on the part of the state, and of the decision of the trial court in the matter, that any actual prejudice resulted; and we find no sufficient reason for overruling the action of the trial court.

Judgment and orders affirmed.

STATE OF MINNESOTA *vs.* GEORGE SAWYER.

April 28, 1890.

Criminal Law—Bond and Stipulation to Abide by Judgment—Subsequent Appeal.—After conviction upon a criminal charge, (the violation of a city ordinance,) the execution of the judgment of the court having been stayed for a stated time, and the defendant having, in connection with such stay, voluntarily entered into a bond to abide by the judgment, and having stipulated so to do, and having expressly waived all objections to the judgment, he has not the right afterwards to assert, in an appellate proceeding, that such judgment was invalid.

Writ of error to the municipal court of Minneapolis.

Thomas J. Leftwich, for plaintiff in error.

Albert H. Hall, for the State.

DICKINSON, J.¹ In November, 1889, the above defendant, upon trial in the municipal court of the city of Minneapolis, was convicted of a violation of a city ordinance relating to the sale of intoxicating liquor, and was sentenced to pay a fine of \$100, and in default thereof to be committed to the workhouse. It was further adjudged, in form, that his license to sell intoxicating liquor be annulled. The court then ordered that the execution of its judgment be stayed until the 10th day of January, 1890. The defendant entered into a bond, in the sum of \$1,500, to appear at that time and abide the order of the court, and to abide by and perform the stipulations entered into at the time of the granting of this stay and the executing of this

¹Mitchell, J., did not sit in this case.

bond. This stipulation, signed by the attorneys for the defendant and the city, respectively, after reciting the facts above referred to, expressed the agreement of the stipulating parties that the defendant should at once close, and keep closed, certain rooms previously used by him in connection with his saloon, to the improper use of which the charge upon which the defendant was convicted related; that on the 10th day of January, 1890, the defendant would appear before the court and pay the fine imposed by the judgment of the court, and would then surrender and release his license for the sale of liquor, and abide by the judgment in every part thereof,—expressly admitting by this stipulation that the forfeiture of the license was in all respects lawful and just, and that the judgment was sustained by the facts and in accordance with law, expressly waiving all objections thereto. On the 10th day of January, 1890, the defendant sued out a writ of error; and now, in this court, he calls in question the validity of the judgment, and particularly with respect to that part of it declaring the license to be forfeited.

We understand from the record, showing the above facts, that after conviction and sentence the defendant procured, or at least accepted and acquiesced in, a stay of proceedings for his benefit and to his advantage, in connection with which he executed the bond and stipulation referred to. This was a part of the proceedings in this cause. Whether the action of the court in the premises was proper and justifiable we do not deem it necessary to consider. The defendant having gained the benefit of a stay of execution by means of his agreement to abide by the judgment, and for that purpose having expressly waived all objection thereto, is now precluded from asserting the contrary. It was competent for him to waive his right of appeal, or any objection that may have existed to the judgment. His action in the premises involved such a waiver, and he has not now the right to invoke a decision from this court as to the validity of the judgment.

Writ quashed, and the cause will be remanded to the court below for execution of the judgment.

CITY OF DULUTH vs. WILLIAM F. MALLET.

April 28, 1890.

City—Power to Prevent Obstruction of Streets by Railway Cars.—

The legislative charter of a city, authorizing the adoption of ordinances to prevent the incumbering of streets with carriages, *held* to authorize an ordinance to prevent the obstruction of streets by railroad cars.

Same—Ordinance not Unreasonable.—An ordinance prohibiting the stopping of railroad cars or locomotives on a street crossing for the switching of cars is not *prima facie* unreasonable and void.

Same—Prosecution of Servant.—It does not exculpate one violating the law that he was an agent acting under the direction of another.

Appeal by defendant from an order of the municipal court of Duluth, refusing a new trial.

White & Reynolds, for appellant.

S. L. Smith, for respondent.

DICKINSON, J. This is a prosecution for the violation of an ordinance of the city of Duluth, which prohibited the stopping of a train of railroad cars or a locomotive on any street-crossing, either for switching or any other purpose whatever, except to prevent accident in case of immediate danger. The defendant was convicted, the case showing that he was the engineer operating a locomotive attached to a long train of freight-cars; that he stopped the train on a street-crossing, (Lake avenue,) and ran back and forth on the crossing several times for the purpose of switching cars and placing them in position, some part of the train being all the time on the crossing,—the street being thus continuously obstructed for a period of from six to ten minutes, according to the testimony on the part of the prosecution; that the train was at a stand-still only long enough to reverse the direction of its motion.

The charter of the city, authorizing the adoption of ordinances "to prevent the incumbering of streets * * * with carriages, carts, wagons, sleighs, boxes, firewood, or any other material or substance whatever," empowered the city council to pass a reasonable

ordinance to prevent such obstructions by railroad cars. They are "carriages," within the meaning of the statute.

If under any circumstances the ordinance could be deemed unreasonable, there was nothing shown in this case to justify the court in so declaring. It is not apparent from the ordinance itself that it was so; and courts are not justified in declaring such enactments unreasonable, and therefore invalid, unless their unreasonableness be clearly shown. *Knobloch v. Chicago, Mil. & St. Paul Ry. Co.*, 31 Minn. 402, (18 N. W. Rep. 106.) No necessity was shown for the use of this street-crossing for the purpose of switching cars. It does not follow that the prohibition of the ordinance was unreasonable merely because it may have interfered with a use of the street-crossing, which was a matter of convenience to the railroad company, nor merely because the switching could not be practicably done at this place in any other manner than that adopted on this occasion.

It did not excuse the engineer of this train that he acted under the direction of a foreman or superior agent of the corporation.

Order affirmed.

HENRY HOMBERG vs. AUGUST KIKHAFFER.

April 28, 1890.

Action on Destroyed Note.—The plaintiff, suing upon a promissory note made by defendant to him, is entitled to recover thereon although it appear that the plaintiff had delivered the note to a third party, offering to transfer it to him for a stated consideration; that such offer was refused; but that such third party had destroyed the note.

Appeal by plaintiff from an order of the district court for McLeod county, *Edson*, J., presiding, refusing a new trial of an action on a promissory note for \$200.

R. H. McClelland, for appellant.

Ed. H. Huebner, for respondent.

DICKINSON, J. This is an action to recover the amount of a promissory note admitted to have been made by the defendant to the plaintiff. The answer put in issue the plaintiff's title, and alleged payment. It appeared by the evidence on the part of the plaintiff that he had caused the note to be delivered to a third party,—the defendant's son,—the plaintiff offering to transfer the note to him as payment *pro tanto* of a debt due him from the plaintiff; that this offer was refused, nor was anything credited to the plaintiff on account of the note, and the plaintiff afterwards paid the debt referred to. The note was never returned to the plaintiff, but the defendant's son destroyed it.

Such being the case presented by the plaintiff at the trial, the court dismissed the action. This was error. The plaintiff made a *prima facie* case, which at least should have gone to the jury. The fact that the note had been destroyed would not preclude a recovery against the maker. The court seems to have considered that, upon the showing that a third party had wrongfully destroyed the note, the action must be prosecuted against him, and cannot be maintained against the maker. This is not the law. The destruction of the note, under the circumstances stated, did not extinguish the obligation of the maker expressed in it, nor divest the plaintiff of his cause of action against the maker.

Order reversed.

ANDREW JOHNSON vs. MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY.

April 30, 1890.

Railway—Negligence—Cattle at Large.—The testimony in this case examined, and *held* not to have justified the verdict therein.

Appeal by defendant from a judgment of the district court for Goodhue county, where the action was tried before *McCluer, J.*, a verdict of \$35 returned for plaintiff, and a new trial refused. The action was begun in justice's court.

W. C. Williston, for appellant.

W. Colvill and *O. M. Hall*, for respondent.

COLLINS, J. Action to recover the value of a cow alleged to have been killed by the negligence of an engineer having charge of a locomotive in operation upon defendant's road.

1. The injuries from which the animal died were inflicted at a point upon a public highway where it was crossed by defendant's tracks, at a season of the year when cattle are prohibited, by the provisions of Gen. St. 1878, c. 10, § 16, subd. 6, from going at large. She was not under restraint or control in any manner, was roaming at will upon the public highway, and was "at large" in violation of the statute. The trial court erred in charging the jury, as it did, in substance, that cattle, when on a highway upon their owner's premises, are not going at large, within the purview of the statute. *Stacey v. Winona & St. Peter R. Co.*, 42 Minn. 158, (43 N. W. Rep. 905.)

2. Under the undisputed facts in the case, the court should have directed a verdict for the defendant. The latter would only be liable for actual negligence on the part of the engineer; for his neglect and failure to exercise reasonable care, and to use due diligence to avoid injury to the cow, upon discovering that she was in the vicinity of the track, and especially after seeing that she had turned around, and was about to cross the railway ahead of his train. There was not a particle of testimony which indicated that, from the time the engineer first saw the cow in the highway, with others, he neglected

or failed in his duty in any respect. Upon the other hand, it clearly appears that he made all reasonable efforts to avoid a collision, and in due time.

Judgment reversed.

PETER ORTH *vs.* ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY
COMPANY.

April 30, 1890.

Master and Servant—Negligence—Sufficiency of Complaint.—Order of the district court denying defendant's motion to make a part of the complaint more definite and certain, considered and affirmed.

Appeal by defendant from an order of the district court for Stearns county, *Searle, J.*, presiding, denying its motion to have the complaint made more definite and certain, in an action to recover \$30,000 for personal injuries.

M. D. Grover and Reynolds & Stewart, for appellant.

Theo. Bruener and D. T. Calhoun, for respondent.

COLLINS, J. Appeal from an order denying a motion that a certain part of the complaint be made more definite and certain. From the pleading in question it appears that plaintiff was employed by defendant as a locomotive fireman. In substance, he alleges that the locomotive upon which he was at work was unsafe, defective, and insufficient, and that Smith, the engineer in charge, ran, operated, and managed it, and performed his duties as such engineer, in a reckless, negligent, careless, and unskilful manner. He further alleges "that, by reason and in consequence of the unsafeness, defectiveness, and insecurity of said locomotive, and the reckless, negligent, careless, and unskilful running, operating, and management of said locomotive by said Smith as such engineer, as aforesaid, the smoke-stack of said locomotive became and then and there was choked, clogged, and stopped up, and by reason thereof the fire, smoke, and steam in said locomotive were violently and in great quantities forced and

thrown into the cab of said locomotive," the place in which plaintiff performed his duties as fireman, to his injury. The motion, based on an affidavit of the defendant's general solicitor, in which he asserts that, after thorough inquiry, the defendant is unable to ascertain what acts or omissions plaintiff relies upon as constituting negligence on its part or upon the part of its servants, either as to the condition of the locomotive or as to its operation and management by the engineer, is that said plaintiff be made to show by his complaint in what respect the locomotive was unsafe, defective, or insufficient, as well as in what particular the engineer in charge was reckless, negligent, careless, or unskilful in its operation and management.

It will be noticed that the plaintiff, in addition to averring, generally, that the locomotive was unsafe, defective, and insufficient, and was recklessly, negligently, carelessly, and unskilfully operated and managed, alleges that in consequence of these defects and mismanagement the smoke-stack became choked, clogged, and stopped up, by reason of which the fire, smoke, and steam violently, and in great quantities, were forced into the cab, causing the injuries of which he complains. Thus we have a well-known part of the locomotive specially designated as that which became choked, clogged, and stopped up, on the occasion referred to, by reason of defects existing in, or because of the mismanagement of, the locomotive, and, further, have it stated unequivocally that, by reason of this condition of the stack, fire, smoke, and steam were violently forced into another well-known part of the locomotive, and the plaintiff injured. It would seem that this is sufficiently certain and definite, unless we assume that many defects might exist about a locomotive whereby its stack could become choked, clogged, or stopped up, or that when the stack is in such a condition there are a variety of ways in which an engineer can so handle his locomotive as to produce the result so distinctly and particularly set forth in this pleading. But the appellant, in its brief, contends that it has a right to know, before it answers in the case, whether the defect complained of was in the smoke-stack of the locomotive, in its fire-box, in the dampers, or elsewhere, and that it should be precisely informed by the plaintiff's complaint whether the engineer improperly managed and manipulated the dampers, or

whether he allowed the exhausts to become closed up, or whether he used too much or too little steam; in brief, just what the engineer did or omitted to do whereby appellant became liable. A complaint should be complete enough to inform the defendant with reasonable certainty of what the plaintiff complains. Should more than this be demanded, a task would be imposed which in some cases could not be performed at all. It would frequently be impossible to adequately state a case of action, if more than reasonable certainty be required. We are convinced that in this instance the plaintiff has been as definite and certain as could reasonably be expected, under the circumstances. He held an inferior position on the locomotive,—that of fireman; and we cannot assume that either before or after the accident he had the ability or the opportunity to locate defects in the locomotive, or that he is now able to say from the result just where they existed. Nor can we assume that a fireman is able to state with exactness the manner in which an engineer so mismanaged his locomotive as to permit it to become in such a dangerous condition as the one in question seems to have been.

Finally, upon a motion to make a pleading more definite and certain it is for the court to consider whether the pleader has been as definite and certain as in the nature of the case could reasonably be expected of him; and to warrant a reversal by this court of an order denying the motion it must be made very clear that the district court has erred in the exercise of an authority to some extent discretionary. *Fraker v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 103, (14 N. W. Rep. 366;) *Madden v. Minn. & St. Louis Ry. Co.*, 30 Minn. 453, (16 N. W. Rep. 263.)

Order affirmed.

LOUIS F. MENAGE vs. JOHN H. BURKE.

April 30, 1890.

Mortgage to Partnership in Firm Name.—A mortgage of real estate to "Farnham & Lovejoy," of a designated place, sustained, as legally sufficient as a mortgage to Sumner W. Farnham and James A. Lovejoy, the members of a partnership engaged in business under the name of "Farnham & Lovejoy."

Same—Foreclosure under Power of Sale.—A statutory foreclosure by those persons, under a power of sale contained in the mortgage, sustained.

Appeal by plaintiff from a judgment of the district court for Hennepin county, where the action was tried by *Lochren, J.*

C. J. Bartleson and *P. M. Woodman*, for appellant.

Miller, Young & Akers, for respondent.

DICKINSON, J. This is an action to determine adverse claims to real estate. The plaintiff asserted that title was acquired through a foreclosure by advertisement of a mortgage given in 1878 by one Mayo, the owner of the land, to "Farnham & Lovejoy, of the county of Hennepin, state of Minnesota." The mortgagees thus designated were the members of a business partnership, their full names being Sumner W. Farnham and James A. Lovejoy; and the mortgage was given to secure an indebtedness of the mortgagor to that firm. The mortgage contained the usual power of sale in favor of the parties of the second part. On default the mortgage was foreclosed, in 1880, by the exercise of that power. The notice of sale, describing the mortgage as given to "Farnham & Lovejoy," contained in parenthesis, immediately following that designation of the mortgagees, the full names of the parties as above given. It was subscribed, "FARNHAM & LOVEJOY, Mortgagees," and further "BOARDMAN & FERGUSON, Attorneys for Mortgagees." The sale was made to "Sumner W. Farnham and James A. Lovejoy." No redemption was made, and the plaintiff has acquired whatever title those purchasers secured through this mortgage and foreclosure. The defendant claims title under a

sale of the same land, in 1889, under execution upon a judgment recovered against Mayo, the mortgagor, in 1879, subsequent to the recording of the mortgage. We are to decide the question of the legal validity of the mortgage and the statutory foreclosure, in respect to which the only defect suggested is from the manner in which the mortgagees are designated in the mortgage.

From the findings of the court it appears that when the mortgage was given, and when it was foreclosed, Sumner W. Farnham and James A. Lovejoy were partners engaged in business under the firm name of Farnham & Lovejoy; that Mayo, in the course of business transactions with that firm, became indebted to them in the sum of \$4,000; and that he gave this mortgage to them to secure the payment of that debt. There have been several decisions of this court in which has been considered the legal effect of deeds and mortgages of real estate in which a mere partnership name or the name of an association had been given as the grantee. *German Land Ass'n v. Scholler*, 10 Minn. 260, (331;) *Morrison v. Mendenhall*, 18 Minn. 212, (232;) *Tidd v. Rines*, 26 Minn. 201, (2 N. W. Rep. 497;) *Gille v. Hunt*, 35 Minn. 357, (29 N. W. Rep. 2;) *Foster v. Johnson*, 39 Minn. 378, (40 N. W. Rep. 255.) And see *Kellogg v. Olson*, 34 Minn. 103, (24 N. W. Rep. 364;) *Townshend v. Goodfellow*, 40 Minn. 312, (41 N. W. Rep. 1056.) The general doctrine there expressed as to the insufficiency of such an instrument, unaided by a court of equity, to transfer a legal title, has been declared to be subject to the qualification that where the partnership name thus employed contains the name or names of one or more of the partners, the instrument will have legal effect as a conveyance or mortgage to the partner or partners thus named. *Gille v. Hunt*, *supra*; *Foster v. Johnson*, *supra*; *Morse v. Carpenter*, 19 Vt. 613; *Beaman v. Whitney*, 20 Me. 413; *Sherry v. Gilmore*, 58 Wis. 324, (17 N. W. Rep. 252;) *Jones v. Neule*, 2 Pat. & H. 339. This controls the decision of this case. While it is necessary to the legal validity of such instruments that there be a grantee having a legal existence, capable of taking, and certainly designated, or so designated that his identity can be certainly ascertained, these conditions are complied with in this case; resort being had, as may be done, to facts beyond the instrument for the purpose

of applying the description or designation of the persons named to the persons so described. *Wakefield v. Brown*, 38 Minn. 361, (37 N. W. Rep. 788;) *Morse v. Carpenter*, *supra*. By this means it was ascertained that the "Farnham" and "Lovejoy," "of the county of Hennepin and state of Minnesota," named in the mortgage as the "parties of the second part," were the persons of those names who were the members of the business copartnership of Farnham & Lovejoy, that is, Sumner W. Farnham and James A. Lovejoy. With this light thrown upon the instrument, it is most reasonable to construe it as made to the two persons thus named, and not merely to the partnership, in the sense of the business relation existing between those persons. Our conclusion is that the mortgage was effectual in law, and that the statutory foreclosure by the exercise of the power of sale was valid.

Judgment reversed, and judgment directed for the plaintiff.

43	213
44	99
48	213
58	364

ROBERT L. WILKINS vs. HUTCHINSON BEVIER.

April 30, 1890.

Possession by Tenant—Notice to Judgment Creditor of Lessor's Rights.

—Where real property upon which a judgment creditor asserts a lien is actually occupied by a third party at the time the judgment is docketed, the creditor is charged with constructive notice of the occupant's rights and interests; and, if the occupant is in possession under a lease, the creditor is also charged with constructive notice of the rights and interests of the person from whom the occupant leases.

Same—Notice of Unrecorded Deed of Lessor.—But the judgment creditor cannot be charged with notice that the lessor—the judgment debtor, in whose name the title to the property appeared of record at the time of the docketing of the judgment—has sold and conveyed the property to another person, although the latter has informed the tenant of his purchase, and that he has a deed from the debtor.

Appeal by plaintiff from a judgment of the district court for St. Louis county, where the action was tried by *Ensign*, J.

McGindley & Cotton, for appellant.

White & Reynolds, for respondent.

COLLINS, J. Action to remove a cloud from the title which plaintiff claims to have to a lot in the city of Duluth. About the 1st of August, 1886, one Austin was the owner in fee of the lot in question. He then entered into a verbal contract with the plaintiff to sell and convey the lot to him for a certain sum, part of which was to be paid in professional services, the balance in cash. These services were rendered, and on October 23d of the same year said Austin made and executed a warranty deed of the premises, in which plaintiff was named as grantee; but he refused to deliver said deed to the plaintiff until the latter paid to him the balance of the purchase-money. This was done, the last payment being on March 27, 1888, at which time the deed was duly delivered to plaintiff. The latter had been acting as agent and attorney for Austin, who died November 7, 1888, for some two years prior to his decease. The lot in question, during all of the period of time covered by these transactions, was vacant and unoccupied, except a small portion in the rear, on which had been erected a brick building owned and occupied by one Buchanan, who had leased the ground from year to year from Austin. In November, 1887, his lease being about to expire, the tenant applied to plaintiff, as Austin's agent, for a renewal; and thereupon there was executed by Austin a lease of the ground actually covered by the building, for one year, commencing November 15, 1887. This lease was witnessed by plaintiff, and Austin's acknowledgment thereto was taken before him as a notary public. At the same time Buchanan paid to plaintiff, for Austin as he supposed, the rent in full for one year; that is, up to November 15, 1888. This lease was not recorded, and the plaintiff failed and neglected to put his deed on record until the 28th day of June, 1888. Long before this, suits had been brought against Austin in the district court of the county in which the lot is situated, and in which all of these parties then resided, for the recovery of money, in one of which this defendant was plaintiff. This plaintiff appeared in that action as Austin's attorney, and on March 31, 1888, verified his client's answer therein. Judgment was entered and docketed against Austin, defendant in said action, on May 24,

1888, more than one month before plaintiff's deed was recorded. The court below found that there was no good or sufficient reason for plaintiff's failure and neglect to put his deed on record until after the judgment was docketed; that, at the time of the docketing, this defendant, judgment creditor, had no knowledge of plaintiff's claim to the lot; that he then knew the record title to be in the judgment debtor, Austin, and also knew that upon the rear end of the premises there was the building before mentioned. And also found that "in the spring or summer of 1888 this plaintiff informed the tenant, Buchanan, that he had purchased the lot, and had a deed therefor, and that between the 15th and 25th days of June, same year, the creditor inquired of Buchanan, and by him was informed that the building was his own, but that he leased the ground upon which it stood from Austin."

The defendant's claim is based solely upon his purchase at a sale on execution issued for the purpose of enforcing the payment of the judgment heretofore described. Therefore both parties assert a title derived from Austin,—the plaintiff through his deed of conveyance, the defendant by means of proceedings upon his judgment. The principal question in the case is whether the latter had such notice of the plaintiff's rights and interests at the time of the docketing of his judgment as would render it subject and secondary to the unrecorded conveyance. If he was possessed of this notice, the defendant's purchase and the sheriff's certificate of sale, as evidence of a paramount title, cannot be allowed to prevail as against the plaintiff's deed. He was not a purchaser in good faith and without notice. *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281, 287. It will be observed that constructive notice only can be urged or is claimed by the appellant; and this arises, if at all, by reason of the actual, visible occupation by Buchanan of a portion of the premises at the time of the docketing of the judgment. The doctrine is well established in this state that a purchaser, by means of the tenant's possession, is put upon inquiry respecting the particulars of his claim and interest, and also from whom he holds; that the actual possession by a tenant not only protects him in all of his rights and interests, but that a pur-

chaser is affected with like notice of title in the occupant's landlord. *Morrison v. March*, 4 Minn. 325, (422;); *Groff v. Ramsey*, 19 Minn. 24, (44.) This is the doctrine found in the greater number of American cases. 2 Pom. Eq. Jur. § 618. A more restricted rule, which prevails in England, has been adopted in some of our states. *Beatie v. Butler*, 21 Mo. 313; *Flagg v. Mann*, 2 Sum. 486, 557; *King v. Paulk*, 85 Ala. 186; *Veazie v. Parker*, 23 Me. 170. The case last mentioned was cited with approval in *Roberts v. Grace*, 16 Minn. 115, (126,) upon the proposition that even an attornment to the grantee, of a tenant holding under the grantor, would not supply the want of registry, because there was no visible change of possession to indicate that there had been a change of title. The point, however, to which the remark was applicable, was not involved in the determination of the *Roberts Case*.

This brings us to a consideration of the relations which existed between appellant and Buchanan, when respondent's judgment was docketed, and what facts the latter might have learned, had he then pursued such inquiries as to Buchanan's claims as the law required. His investigations must be made at the time of the docketing of the judgment; and he will be held, in the absence of inquiries, as having knowledge of what he could have then learned. Therefore, it is quite immaterial, in this case, that Bevier, the judgment creditor, was permitted to testify that a few days subsequent to the entry of the judgment he inquired of Buchanan, the tenant, and was informed by him that he leased from Austin; and equally as immaterial that the trial court passed upon this in its findings of fact. The admission of the testimony, and the finding thereon, did not prejudice the appellant, because the rights of the respondent must be determined by what he knew, or might have learned upon proper inquiry, at the time his judgment was docketed. The lien of the judgment could not be impaired or aided by subsequently acquired knowledge as to the tenant's interest or his landlord's title. From the findings it appears that "in the spring or early summer of 1888" the appellant notified Buchanan of his purchase from Austin, and that he had a deed of the premises. This is indefinite, and no

effort was made in the court below to have the finding made more exact as to the time. But this is of no practical consequence; for we shall assume, while considering the question, that this information was imparted, as appellant claims, shortly after March 27th, when he received his deed, and antecedent to the 24th of May, the day of the docketing of the judgment. For several years, Buchanan, the tenant, had held from year to year under a lease from Austin, the judgment debtor; and for some time, at least, Wilkins, the appellant, had been the landlord's agent in respect to the leased property. This was well known to the tenant when he, in November, 1887, applied to the agent for a renewal of his lease; and he then paid one year's rent in advance to Wilkins, for Austin, as he supposed. A lease for the year ending November 15, 1888, was then signed by Austin, witnessed by the appellant, who also, as a notary, took and certified to Austin's acknowledgment thereof. It was under this lease, with the rent fully paid in advance for the term, that Buchanan held when the judgment was docketed. The tenant was notified by the appellant that he had succeeded by deed to Austin's title; but there is nothing in the record to show that at any time prior to the expiration of the term covered by the lease, or in any manner, Buchanan recognized or acknowledged appellant as his landlord. He did not expressly attorn, nor did he pay rent to appellant as the owner, and thus attorn by implication. At no time was the tenant in a position where he could not have been permitted, had occasion arisen, to deny, and to have put appellant upon proof of, his alleged title, although, by virtue of the conveyance, appellant secured Austin's title to the property as well as his rights in the written lease, including such as might arise by reason of the tenant's covenants, if any there were. This, of itself, did not constitute him the landlord.

Now, with this condition of affairs, was Buchanan's possession notice to the judgment creditor of the title now asserted by the appellant? Admitting it to have been the creditor's duty to have followed up the suggestion which the occupancy of the premises by a third party implied, to have investigated Buchanan's claims, and that he must be presumed to know all the facts which inquiry would have

developed, all that he might have learned had he interrogated Buchanan, what knowledge would he have acquired, in the natural course of events, and what must he be charged with as in his reach, had he attempted to obtain it? Certainly, he would have been told that Buchanan owned the building, and had leased the ground on which it stood for the year ending November 15th, following. The tenant's interest would have been defined by this answer, but the pursuit of information as to the actual title could not safely stop at this point. It would be incumbent upon the creditor to ascertain from whom he leased. To a verbal inquiry Buchanan's answer would have been, naturally and truthfully, that he leased from Austin; or, had the creditor called for the written lease, he would have learned precisely the same thing. It would seem plain that the law cannot require further or other inquiries, or hold the creditor as having knowledge, and therefore constructive notice, of facts which these inquiries might possibly, but not naturally, lead to,—such, for instance, as a disclosure that the lessor, the judgment debtor, in whose name the title to the property appears of record, has very recently sold to another person. It would also seem plain that no more should be required of the creditor than that he inspect the lease, or by verbal inquiry obtain information as to who may have executed it, and therefore assumed to have interests in the demised premises; failing so to do, that he be charged with the knowledge which he would have thus obtained. It is possible that, in the course of the conversation with Buchanan in respect to his rights in the premises, he would have informed the respondent of the sale and conveyance to appellant, but the conclusion is inevitable that such would not have been the natural or ordinary result of pertinent inquiries upon the subject, and, obviously, an inspection of the lease under which the tenant occupied would not have conveyed the slightest intimation of appellant's claim.

Of the seventh assignment of error we need but to say that, if the judgment herein involved was not against the person in whose name the title to the lot appeared of record prior to the recording of appellant's deed, the latter cannot be allowed to maintain the action. *Coles v. Berryhill*, 37 Minn. 56, (33 N. W. Rep. 213.) It was only

upon the assumption that the title of record was in Austin at the time of the docketing that the suit was brought, tried, or determined.

Judgment affirmed.

NOTE. By stipulation between the parties the decision in case of *Robert L. Wilkins v. Henry H. Bell*, argued with the foregoing case, by the same counsel, followed that in the foregoing case.

**G. A. COUSINS vs. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY
COMPANY.**

April 30, 1890.

Statute of Limitations—Account for Goods Sold at Different Dates.

—An account showing on one side items for goods sold and delivered at different dates, and payments made by the purchaser on the other side, is not a mutual, open, current account, within the meaning of the statute of limitations; and its operation is not suspended, as respects the earlier items of the account, until the date of the last item proved therein.

Action brought in the district court for Anoka county, to recover \$2,836.88, with interest from July 15, 1882. Trial before Robert D. Russell, Esq., as referee, who ordered judgment for plaintiff for \$196.75. Plaintiff appeals from the judgment.

Morrill & Niles, for appellant.

M. D. Grover, for respondent.

VANDEBURGH, J.¹ The action is brought to recover a balance on an account for lumber sold to the defendant by one W. Hammons, the cause of action having been by the latter assigned to the plaintiff. It was tried before a referee, who finds that the lumber was furnished to the defendant during the years 1881–82, on orders for specific quantities. The prices were not agreed on before delivery, but were generally fixed by the defendant. Several different accounts were made out for the lumber furnished in 1881, which were approved

¹ Mitchell, J., was absent, and took no part in this case.

by defendant's officers, and subsequently paid to Hammons. Some he receipted in full. In respect to others, he insisted that the prices fixed and paid by defendant were too low. In January and February, 1882, Hammons also shipped to defendant two different lots of ties, sending separate invoices with each shipment. These were paid for at his own price. The last transactions were two shipments of piles to the defendant on the 24th and 29th days of June, 1882, respectively, which have never been paid for, and for which the referee finds there is still due the sum of \$130.86 and interest. In respect to any alleged balance of account due and unpaid for the lumber furnished in 1881, the referee ruled that the statute had run before this suit was brought; the last bill of lumber furnished that year having been delivered in November, 1881, and this action was commenced December 23, 1887. In this we discover no error. The account, in this case, is not a mutual, open, current account, with reciprocal demands between the parties; nor does the referee find that the lumber delivered was all furnished upon, and in pursuance of, one entire contract, and it is not assigned as error that the findings of fact are insufficient or unsupported in this respect. And the operation of the statute of limitations was not suspended, as respects previous items, until the delivery of the last. The only amount for which a recovery can be had, therefore, is for the balance due for lumber furnished in 1882. The record in this court does not show that the amount so found due plaintiff for these items is too small, nor is that question raised by the assignment of error.

Judgment affirmed.

LOUIS H. MAXFIELD and another *vs.* MICHAEL SCHWARTZ and another.

April 30, 1890.

48	221
45	150
43	221
55	355
43	221
71	335

Agreement to Pay Another's Debts—Action by Creditor.—Where the purchaser of a stock of goods of a partnership agreed, as a part of the consideration therefor, to assume and pay the existing firm debts of the vendors, the creditors of the firm may enforce the contract thus made for their benefit by action against such purchaser, though they were not specifically named or designated in the contract of sale.

Appeal by defendants from an order of the district court for Scott county, *Edson, J.*, presiding, overruling their demurrer to the complaint. The action was brought to recover \$287.81, on the agreement of defendants stated in the opinion.

Macdonald & McLaughlin, for appellants.

Southworth & Collier, for respondents.

VANDEBURGH, J.¹ The complaint shows that on the 19th day of July, 1889, and for a long time prior thereto, the firm of Berens & Nachtsheim were engaged in business as general merchants in the city of Shakopee, and owned a stock of goods and merchandise, book-accounts, claims, and demands, and at that date entered into an agreement in writing with the defendants in this action, whereby they agreed to sell and deliver to the defendants all the property of every kind then belonging to them, and the defendants agreed, as consideration for such purchase, to pay the sum of \$5,071, and did also undertake and agree to and with Berens & Nachtsheim to pay all the debts and liabilities of the last-named firm as the same should become due and payable. Berens & Nachtsheim thereupon delivered over to the defendants the firm property so agreed to be sold, and the latter paid the sum of \$5,071 agreed on, and assumed the debts and liabilities above mentioned. Among these debts and liabilities was a debt due and owing plaintiffs for goods and merchandise pre-

¹Mitchell, J., did not sit in this case.

viously purchased of them by Berens & Nachtsheim, and for the recovery of a balance due thereon this action is brought.

By their agreement with their vendors the defendants made the outstanding debts of the firm a liability of their own. *Sullivan v. Murphy*, 23 Minn. 6. The promise or agreement of the defendants in this case is, in legal effect, to pay to the creditors of Berens & Nachtsheim, who were such at the time the promise was made, the debts due them from the vendors of the defendants, from whom the consideration moved. *Barlow v. Myers*, 64 N. Y. 41. The plaintiffs are shown to belong to this class of creditors, and are therefore among those intended to be benefited, and are entitled to enforce the contract directly for their own benefit, and to maintain this action for the amount due them. *Bassett v. Hughes*, 43 Wis. 319; *Snell v. Ives*, 85 Ill. 279.

Order affirmed.

ANDREW JOHNSON vs. ST. PAUL & DULUTH RAILROAD COMPANY.

April 30, 1890.

Railway—Negligence of Fellow-Servant—Statutory Liability.—Held, (following *Lavalles v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249,) that Laws 1887, c. 13, applies only to employes of railway corporations exposed to the peculiar hazards connected with the use and operation of the road.

Same—Servants Engaged in Repairing Bridge.—A crew of men, of which plaintiff was one, was engaged in repairing a bridge on defendant's road, and in performing the work it was necessary to leave the draw partly open. Through the negligence of one of the crew, the draw was left unfastened, and was blown shut by the wind, and injured the plaintiff while at work between the stationary part of the bridge and draw. *Held*, that defendant was not liable.

Action brought in the district court for St. Louis county, to recover \$10,250 for personal injuries. Trial before *Stearns, J.*, who ordered

43	222
44	10
43	222
46	356
43	222
47	10
43	222
48	239
43	222
48	239
43	222
56	550
43	222
179	249
43	222
80	31
43	222
85	450

a dismissal at the close of plaintiff's case. Appeal by plaintiff from an order refusing a new trial.

Draper & Davis, for appellant.

White & Reynolds, for respondent.

MITCHELL, J. The injury to plaintiff having been caused by the negligence of his fellow-servant, he cannot recover, unless under Laws 1887, c. 13. In *Lavallee v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249, (41 N. W. Rep. 974,) in which this statute was very fully considered, we held that it applied only to the peculiar hazards incident to the use and operation of railroads; that it must be construed as designed exclusively for the benefit of those who are in the course of their employment exposed to such hazards, and whose injuries are caused by them. And the more we consider the question the more are we confirmed in the opinion that it is only when construed as subject to some such limitation that the statute can be sustained as a valid law. As was said in the case referred to, to avoid the imputation of "class" legislation, the classification, in cases of special legislation, must be made "upon some apparent, natural reason,—some reason suggested by necessity, by such a difference in the situation and circumstances of the subjects placed in different classes as suggests the necessity or propriety of different legislation with respect to them." If a distinction is to be made as to the liability of employers to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability cannot be established for railway companies, merely as such, and another rule for other employers, under like circumstances and conditions, unless upon the theory suggested in *Mo. Pac. Ry. Co. v. Mackey*, 127 U. S. 205, (8 Sup. Ct. Rep. 1161,) that the state may "prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters,"—a proposition which, as thus broadly stated, that court, in view of its later utterances, could hardly have intended to announce. Indeed, the particular question now under consideration was not before the court, and, presumably, was not in mind. Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads.

It has been sometimes loosely stated that special legislation is not class, "if all persons brought under its influence are treated alike under the same conditions." But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought "within its influence," but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists. Hence most courts, as notably in Iowa and Kansas, have held that similar statutes, although general in their terms, embrace only "the peculiar hazards of railroading." But, when we come to examine the adjudicated cases, we confess we are unable to discover any definite, consistent, or logical rule which the courts have applied in determining whether, upon the facts of a particular case, it fell within or without the statute. In some cases it has been held that the statute applied because the duty of the employes required them to ride upon the cars to the place of work, although the injury was not sustained while thus riding, and was not caused by, or in any manner connected with, the operation of the road. Such a position seems to us wholly illogical. Other cases have been held within the statute because the work being performed was necessary to the use and operation of the road, although the injury sustained was not caused by, or connected with, such use and operation. This, we think, is equally illogical. In fact, the proposition is so broad and indefinite as to bring within the act all employes, regardless of the nature of their employment; for the work of all, even clerks in offices, is, in a sense, necessary to the use and operation of the road. Therefore, after mature consideration, our conclusion is that, if any limitation is to be placed by the courts upon the application of this statute, (and on constitutional grounds there must be,) the only one which will furnish any definite or logical rule is to hold that it only applies to those employes who are exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers. We do not mean to say that there may not be reasons suggested by some

differences in the nature of the employment which would warrant the legislature in placing some other hazards within the provisions of such a law; but, if the courts should attempt to impose upon the general language of this statute any other limitation than the one suggested, they would be all at sea, without either rudder or compass.

Applying the test suggested, it is clear that plaintiff's case is not within the provisions of the act. A crew of men, of which plaintiff was one, was engaged in repairing a drawbridge on defendant's railroad. In doing this work it was necessary to leave the draw partly open. Plaintiff was at work between the stationary part of the bridge and the draw, when the wind blew the draw shut, and injured him. The draw might and should have been fastened open, which was omitted to be done through the negligence of the foreman of the crew. Plaintiff was not engaged in operating the road, nor was his injury caused by any of the hazards incident to its operation, any more than in the case of the helper in the repair-shops in the *Lavalles Case*. As suggested by counsel for defendant, suppose there had been a wagon bridge over the St. Louis river, alongside of this railroad bridge, and one of a crew engaged in repairing it had been injured under like circumstances. He could not have recovered from his employer. Yet the actual situation, both as to the nature of the employment and the cause of the injury, would have been the same in either case.

Order affirmed.

v.43m—15

RICHARD CULLEN *vs.* HENRY H. BELL.

April 30, 1890.

48	226
84	524

Real-Estate Agents—Commissions—Abortive Negotiation with Customer—Subsequent Sale by Owner.—Where a land-owner agrees with an agent to pay him a specified gross sum if he will procure a purchaser of a lot of land at a stipulated price, the agent cannot recover the sum agreed on as his commission without procuring a purchaser able, ready, and willing to pay such price; and where negotiations by the agent with one who contemplates buying at some price are not concluded, and the same are voluntarily broken off by the customer, and he afterwards purchases the same property directly from the owner at a less price, the agent is not entitled to recover.

Appeal by plaintiff from an order of the district court for St. Louis county, *Stearns, J.*, presiding, setting aside a verdict of \$2,500 in his favor, and granting a new trial.

Tear & Davies, for appellant.

White & Reynolds, for respondent.

VANDEBURGH, J. The plaintiff seeks to recover of the defendant the amount of his commissions for the sale of certain real estate of the latter. He alleges that the defendant agreed to pay him a commission if he found a purchaser for the land, and that plaintiff entered into negotiations for a purchase thereof with one Murphy, who through his instrumentality was made acquainted with the property and the ownership thereof, and who thereupon went to the defendant and purchased the same of him, and that plaintiff was the procuring cause of the sale of the lots, and the defendant consummated the sale with full knowledge of the fact that the purchaser was procured through plaintiff's agency. The undisputed evidence, however, shows that the plaintiff, who was a real-estate agent, had correspondence with Murphy, and at his instance he had been induced to visit Duluth for the purpose of examining property and prices. Defendant had previously authorized the plaintiff to sell the property at \$75,000, and agreed to pay him a commission of \$5,000 if he found a purchaser at that price. After examining the property, Murphy

objected to the price as too high, but expressed his willingness to buy it after a few days, upon his return to the city, if a reasonable reduction in the price could be secured; but the amount or price at which he might be induced to purchase was not fixed, agreed on, or mentioned. Thereupon the plaintiff had an interview with defendant on the subject, and a new and specific arrangement was made between them, by which the defendant fixed the price at \$65,000, and plaintiff's commission at \$2,500; and a memorandum in writing, expressing those figures, was given to the plaintiff by the defendant. The plaintiff in his evidence, it is true, states that he was to have \$2,500 commission if he procured a purchaser; but it is clear, we think, that the contract, as testified to by both parties, must be construed to have been that the price was \$65,000, and the commission to be \$2,500, if a purchaser was found at that price, and defendant expressly refused to give plaintiff the exclusive agency. Murphy soon after returned, but had no further communication or dealings with the plaintiff, though he was notified by the latter that the price of the land was reduced to \$65,000; but he subsequently entered into negotiations with defendant, and finally purchased the same of him at \$60,000, with an allowance of \$500 for commissions.

In this class of cases the agent is entitled to his commissions when he procures a purchaser able, willing, and ready to complete the purchase on the terms stipulated. *Hamlin v. Schulte*, 34 Minn. 534, (27 N. W. Rep. 301;) *Armstrong v. Wann*, 29 Minn. 126, (12 N. W. Rep. 345.) The terms fixed by the seller in the agreement with the agent here were clearly specified. He was offered \$5,000 if he procured a purchaser of the premises at the price of \$75,000, and afterwards \$2,500 if he procured one at \$65,000. *Non constat* that the seller agreed or would have done so, or was obligated, to pay him that commission or any commission if he procured a purchaser willing to pay only \$60,000. Nor does it appear from the evidence in the case that the plaintiff had secured a purchaser at the agreed or any other price. He corresponded with him, called his attention to the property, and had received encouragement from him, and a general promise to buy if a reasonable reduction was made in the price; but negotiations proceeded no further, and the plaintiff did

not succeed in obtaining his consent to any definite proposition, but he thereupon voluntarily repudiated plaintiff's agency, and refused to have anything more to do with him. The plaintiff had not at that time earned his commission, and the sale was not afterwards consummated on the terms stipulated with the agent, nor in pursuance of, or in fulfilment of, any agreement negotiated by him. The plaintiff had no exclusive agency of the property. The defendant retained the right to sell, and he was not precluded from selling to Murphy before the plaintiff had concluded an agreement with him, if there was no fraudulent interference or device to escape the payment of a commission, which does not appear. *McArthur v. Slauson*, 53 Wis. 41, (9 N. W. Rep. 784.)

Order affirmed.

48	228
51	308
43	228
70	152

JAMES E. GLASS and another vs. ST. PAUL PARK CARRIAGE & SLEIGH COMPANY and others.

April 30, 1890.

Mechanic's Lien—Several Buildings on One Lot.—Where material is furnished under an entire contract for the erection of several buildings owned by the same person, and situated upon the same lot or tract of land, a lien attaches upon the whole, as an entirety, and for the gross value of the material so furnished. Following *Lax v. Peterson*, 42 Minn. 214, on this point.

Same—Complaint—Averments as to Making and Filing Lien Statement.—The only allegation in the complaint in regard to the making and filing of an affidavit for a lien was that, for the purpose of securing a lien upon the premises, plaintiffs duly made an account, in writing, of the items of material so sold, and of the value of the same, to which oath was duly made upon a certain day, and that the same, with a copy of the written contract under which the lumber was furnished, was duly filed and recorded, etc. *Held*, that in this respect the complaint was sufficient as against a motion to strike out all allegations relating to a lien on the ground that facts sufficient to entitle plaintiffs to such relief were not stated therein.

Appeal by plaintiffs from an order of the district court for Washington county, *McCluer, J.*, presiding, striking out "that portion of the complaint having reference to the lien claimed therein."

H. V. Rutherford, for appellants.

Walter Holcomb, for respondents.

COLLINS, J.¹ Plaintiffs in this action seek to obtain a judgment against the defendant first named on account of lumber and other building material sold and delivered, and to have said judgment declared a lien upon certain town lots, and the buildings thereon, for the construction of which, it is averred, the aforesaid building material was sold. A motion to strike out of the complaint all allegations pertaining to the lien was granted upon the ground that, as set forth in the pleading, they did not constitute facts sufficient to entitle plaintiffs to a lien upon the premises; plaintiffs appealing. As will be noticed, the question is one of pleading, not of proof.

1. Among other allegations in reference to the lien claim, it is averred in the complaint that the lumber was furnished pursuant to a written, and the other material pursuant to a verbal, contract, between the parties, for the purpose of erecting a frame warehouse and a frame factory building upon a certain tract of land, less than one acre in extent, and particularly described as "lots numbered 5, 6, 7, 8, 9, and 10, in block 104," etc., and that all of said material was used in the construction of said buildings. From the decision made below, which was filed prior to that of this court in *Lax v. Peterson*, 42 Minn. 214, (44 N. W. Rep. 3,) it is evident that the learned judge was of the opinion that the claim for the materials furnished by plaintiffs should have been separated, and that a lien for the gross amount of the debt could not be adjudged against the six lots and two buildings as an entirety. In this view the court erred. The several lots are alleged to be but one tract of land, that is, one "lot," within the meaning of the statute; and, where materials are furnished under an entire contract for the erection of several buildings owned by the same person, and situated upon the same lot or tract of land, a lien attaches upon the whole as an entirety, and for the gross value

¹ Mitchell, J., was absent, and took no part in this case.

of the material so furnished. *Laz v. Peterson, supra*. See, also, in addition to the cases there cited, *Bowman Lumber Co. v. Newton*, 72 Iowa, 90, (33 N. W. Rep. 377;) *Lyon v. Logan*, 68 Tex. 521, (5 S. W. Rep. 72.)

2. The respondents further insist that the complaint is fatally defective in respect to the affidavit for a lien, but this point does not seem to have been made in the court below. The allegation deemed insufficient was that, for the purpose of securing a lien on the premises, plaintiffs duly made an account in writing of the items of material so sold, and of the value of the same, to which oath was duly made upon a certain day, and that the same, with a copy of the written contract under which the lumber was furnished, was duly filed and recorded upon a day named in the office of the register of deeds for the county in which the premises were situated. Although the plaintiffs have not alleged the filing of an account for a lien formulated with regard to the provisions of Gen. St. 1878, c. 90, § 18, nor have they set forth the making and filing of an affidavit containing all that has been deemed upon trial as absolutely essential, the pleader has shown a compliance in all respects with the requirements of section 7 of said chapter 90. As against a motion to strike out upon the grounds herein mentioned, we are of the opinion that the pleading is sufficient under the decisions of this court in *Minn. & St. Louis Ry. Co. v. Morrison*, 23 Minn. 308; *Folsom v. County of Chisago*, 28 Minn. 324, (9 N. W. Rep. 881;) *Goetz v. School District*, 31 Minn. 164, (17 N. W. Rep. 276.)

Order reversed.

STATE OF MINNESOTA vs. PETER SCHROEDER.

April 30, 1890.

43	231
45	44
43	231
86	123

Intoxicating Liquor—Sale by Brewer without License.—Under Gen. St. 1878, c. 16, § 4, a manufacturer of intoxicating liquor in this state cannot sell his liquor in a less quantity than five gallons, without obtaining a license from the authorities of the place where the sale is made.

Case certified, after verdict of guilty, from the district court for Otter Tail county, *Baxter, J.*, presiding.

Mason & Hilton, for defendant.

Moses E. Clapp and *C. C. Houpt*, for the State.

MITCHELL, J. The defendant was convicted of selling at the village of Henning, in Otter Tail county, intoxicating liquor, to wit, beer, in a quantity less than five gallons, without having first obtained a license from the village council. The undisputed evidence showed that defendant, a brewer, was engaged in the manufacture of beer at Perham in the same county. This beer was put in small four-gallon kegs, and shipped to Henning, where he had a store-house, in charge of an agent, where the beer was kept for sale. The beer was sold only by the keg. The sale in question consisted of a sale of one of these four-gallon kegs to one Hanson. Defendant had no license to sell intoxicating liquors in the village of Henning.

The only question in the case is whether a manufacturer of beer has a right to sell the same in quantities less than five gallons, without first procuring a license therefor from the authorities of the place where the sale is made. If we have been so unfortunate as not to have made this matter clear by our decisions, the statute itself leaves no room for doubt. It prohibits, without qualification or exception, any sale or barter, by any person, of any spirituous, vinous, fermented, or malt liquors, in a less quantity than five gallons, without having first obtained license therefor. While it is undoubtedly true, as we have previously had occasion to say, that the great aim of the law was to regulate the retail sale of intoxicating liquors to consumers, yet, as the most effectual means of accomplishing this, the legis-

lature has adopted the policy of absolutely prohibiting any sale by any person of a quantity less than five gallons, without first obtaining a license therefor. *State v. Benz*, 41 Minn. 30, (42 N. W. Rep. 547.) The necessity for first obtaining a license is not made to depend upon the general business of either the seller or the purchaser, or the nature of the package in which the liquor is contained, or the purpose for which the liquor is sold or purchased, or where it is to be consumed, but solely and exclusively upon the quantity sold or bartered. There is no room, under the language of the statute, to exclude from its operation manufacturers, any more than any other class of persons engaged in the sale of intoxicating liquors. Neither can any distinction be made based upon the nature of the vessel or receptacle containing the liquor. The terms of the act leave no room for any such discrimination. Moreover, if a manufacturer who sells in what counsel calls the "original packages" was to be excepted from the operation of the statute, it would lead to a defeat of the very object of the law; for, by merely reducing the size of the "original packages," the same practical evils would result as from the unrestricted sale of liquor by the glass in the ordinary saloon. The defendant was properly convicted.

The cause is remanded, with directions to the trial court to pronounce sentence upon the verdict.

ERICK OLSON *vs.* MARY A. CREMER and another.

April 30, 1890.

Due-Bill given in Settlement.—*Held* that, under the undisputed evidence in this case, the instructions of the trial court to the jury were correct.

Action in the district court for Ramsey county, to recover \$325 and interest, on an alleged agreement as to division of commissions which is stated in the opinion. Defence, among others, a settlement and the delivery and acceptance of defendants' due-bill for \$100 in full of plaintiff's claim. Trial before *Wilkin*, J., the principal issue being as to the acceptance of the due-bill in full settlement, the court

instructing the jury that if it was so accepted, plaintiff could recover only the amount of it, less \$47 already paid; and that if it were not so accepted, the plaintiff was entitled to recover \$325 less the \$47 paid. The jury found for plaintiff, a new trial was refused, judgment for \$356.61 was entered on the verdict, and the defendants appealed.

H. C. McCarty, for appellants.

H. L. Williams, for respondent.

MITCHELL, J. We think that appellants' counsel may have been somewhat misled by the trial judge's memorandum, to which, rather than the record, his argument seems directed. The case turns upon the state of the evidence rather than upon what is admitted in the pleadings. The undisputed evidence is that plaintiff had a general agreement with Cremer, who was engaged in the real-estate agency business, that he should have half the commissions on all sales of property listed in Cremer's office for which he procured the purchasers; that subsequently Hammer came into the business as a partner of Cremer; that thereupon, and before the sale in question was closed, plaintiff had an understanding with Hammer that the previous arrangement with Cremer was to be continued with the firm of Cremer & Hammer; that plaintiff found a purchaser to whom a piece of property was sold after Hammer became a member of the firm, and on which the firm received a commission of \$650. Defendants did not offer any evidence to controvert any of these facts. Upon this state of the evidence, the court correctly instructed the jury that the only issue was whether plaintiff had accepted from defendants a certain due-bill in full settlement for his share of the commission. Upon the evidence, this was fairly a question for the jury.

Judgment affirmed.

GEORGE GAME *vs.* ARCHIE WHALEY.

May 5, 1890.

Chattel Mortgage—Replevin—Evidence.—Claim by defendant of the right of possession of personal property by virtue of a mortgage *held* unsustained, for lack of proof of the identity of the property mortgaged and the property in controversy.

Appeal by defendant from a judgment of the district court for Clay county, *Holland, J.*, presiding.

Taylor & Greene, for appellant.

O. Mosness, for respondent.

By the Court. This action was commenced in a justice's court for the recovery of certain personal property. Judgment was recovered by the plaintiff, which upon appeal was affirmed in the district court; and from the judgment of the latter court this appeal was taken.

The plaintiff alleged that he was the owner of the property. The defendant, in his answer, denying the plaintiff's ownership, asserted his right to the possession of the property under a chattel mortgage executed by one James Game to the McCormick Harvesting-Machine Company, the defendant being the agent of that company. The district court decided the case upon its construction that chapter 58 of the Laws of 1887, amending the law as to the period of time during which chattel mortgages should be deemed valid as to subsequent purchasers, was not applicable to mortgages executed prior to that amendment of the law; and to the consideration of that question the brief of the appellant has been devoted. But since, for another reason relied upon by the respondent, the judgment must be affirmed, and as a fact which might be found to be important as affecting the question of the applicability of the law of 1887 to this case is not disclosed by the record, we do not enter upon the consideration of that question. The case shows that the defendant took the property from the possession of the plaintiff. The plaintiff testified, without objection, that he was the owner of it. This constituted a *prima facie*

case in favor of the plaintiff. This is not opposed by any evidence that the property was ever owned by any other person. To overcome the plaintiff's case the defendant relied upon the asserted rights of his principal, as mortgagee, under the mortgage executed by a third person, James Game. But, while the mortgage was offered in evidence, there was no proof that the property mortgaged and the property in question were the same. For this reason, if for no other, the judgment of the justice of the peace, and of the district court affirming it, were right.

Judgment affirmed.

CHARLES A. EBERT vs. JOHN H. LONG.

May 5, 1890.

48 215
79 88

Judgment—Allowance of Credits in Former Action.—In execution of a judgment owned jointly by these parties certain land was sold. Long purchased it at the sale, and took the sheriff's certificate to himself. Ebert was equitably entitled to an interest therein, and to share in the money that might be paid for redemption. In an action by Long against Ebert for the recovery of money, Long allowed to Ebert a credit of \$794 on account of Ebert's interest in that matter, and deducted it from the amount of his claim. This credit was set forth in a bill of particulars served in the action. *Held*, that Ebert, by not disclaiming or rejecting this allowance of credit, is to be deemed to have accepted it; and, after a recovery by Long in that action, Ebert was precluded from recovering from Long a share of the money afterwards paid for redemption from the execution sale.

Appeal by defendant from a judgment of the district court for Hennepin county and from an order by *Hicks, J.*, refusing a new trial.

Andrew T. Keyes, for appellant.

Chas. A. Ebert (pro se) and *Henry Ebert*, for respondent.

DICKINSON, J.¹ In March, 1887, a judgment for the recovery of

¹ Mitchell, J., took no part in this case.

money was secured in favor of one Conway Hodsdon against one Ebenezer A. Hodsdon. Soon thereafter this judgment was assigned to the parties to this action. In January, 1888, upon a sale of certain lands under execution issued to enforce that judgment, this defendant, Long, purchased the property in his own name and in his own behalf, and received the sheriff's certificate of sale, in which he (Long) was named as the purchaser. The amount bid upon such sale was the amount of the Hodsdon judgment then unpaid. Long paid no money upon such purchase, but applied the judgment, then owned by himself and this plaintiff, in making such purchase. It has been found by the court that the purchase by the defendant in his own name, and by the appropriation of the judgment for that purpose, was not authorized by the plaintiff. Prior to the expiration of the period for redemption from that execution sale the plaintiff commenced this action, in which he sought the judgment of the court declaring him to be a cotenant with the defendant in the interest acquired by the execution sale represented by the sheriff's certificate of sale; that, as respects his interest therein, the defendant be adjudged to hold such certificate as trustee for the plaintiff; and that, in case of redemption from such sale, the plaintiff be adjudged to be entitled to receive such part of the redemption money as should correspond to his interest in the judgment and certificate of sale. Upon the findings of the court, in accordance with the plaintiff's claim, judgment was entered in his favor for the recovery of a specified proportion of the redemption money, the judgment reciting the fact that the money required to make redemption had then been paid to the sheriff. Hence, on this appeal by the defendant, attention will be directed particularly to the right of the plaintiff to receive the proportion of the redemption money awarded by the court, the same being a little less than one-half of the whole amount paid to the sheriff for redemption.

The principal question here presented is whether the matter in issue, and the ground of the recovery allowed, were so involved in other litigation between these parties, and in the judgment therein, as to have become *res judicata*. The prior adjudication referred to was in an action prosecuted by this defendant, Long, against this

plaintiff, Ebert, to recover more than \$2,000 for services alleged to have been rendered by the former for the latter. The complaint in that action admitted the payment, on account of such services, of the sum of \$1,050. A bill of particulars was served by the plaintiff in that action, setting forth the items of the charges upon which recovery was sought, and also several items of credit allowed by him (Long) in reduction thereof. Among the items of credit shown in that statement, constituting a part of the credit allowed by plaintiff in his complaint, was the following, which refers to the Hodsdon judgment above mentioned: "Deft. interest in Hodsdon v. Hodsdon judgment, \$794." The answer of this plaintiff, Ebert, in that action, denied the alleged value of such services, averred that such services as were rendered were rendered under an agreement that for all services to be rendered by Long he was to be compensated in a special manner, (particularly stated,) and that he had been compensated in that manner. Matter of counterclaim or set-off was also pleaded. Upon the trial of that action, in May, 1888, the plaintiff, Long, recovered a verdict, upon which judgment was rendered for about \$550. It appears that on the trial of that action Long testified that Ebert "had an interest in a judgment for \$794. The land was sold and the certificate taken in my name. I have given him credit on here [probably referring to his bill of particulars] for that \$794." He was cross-examined as to Ebert's knowledge of the land having been purchased by Long in his own name, and testified that it had been agreed that it should be so done. The defendant, Ebert, testifying in his own behalf, denied this. In the general charge of the court in that action allusion was made to "payments" as a matter for the consideration of the jury.

It may be conceded that the action of Long against Ebert, which may be designated as the former action between these parties, did not involve the issue as to whether Ebert was in the contemplation of equity an owner, in common with Long, of the sheriff's certificate of sale, and interested, in common with Long, in the land which the latter had purchased under execution; that there has been no prior adjudication as to that matter; and that by the decision in this action it has been for the first time formally and judicially determined

that Ebert had any such interest or right. But in this action the defendant pleaded, in effect, among other things, that the amount of the plaintiff's interest in the Hodsdon judgment was deducted from the amount of this defendant's demand, whose recovery was for only the remainder thus found due to him. The evidence presented in this case, and to which we have referred, sustains this contention of the defendant, and there was no evidence opposed to this. It is true that as Ebert's right and interest, after the execution sale and before redemption, was a right and interest in respect to the *land*, and not merely in respect to the money which might thereafter be paid for redemption,—it might be that no redemption would be made,—he could not have been compelled to accept from Long an equivalent in money, and to surrender his interest in respect to the land. But he might do so voluntarily. And this, we think, the case shows he did do in effect. In the former action, involving matters of account between the parties, Long unequivocally admitted Ebert's interest with himself in the matter here in issue growing out of the Hodsdon judgment, and formally allowed \$794 to be credited to Ebert in that action, with some other items of credit, in reduction of his demand against Ebert. No other construction could be put upon this than that Long intended, by allowing that sum to be credited to Ebert in the judicial adjustment of their accounts, to thus satisfy his obligation to Ebert in respect to the interest of the latter in the matter of the Hodsdon judgment. It was not a mere gratuitous deduction of \$794 from his account against Long. The credit given in that manner by Long, in the account sued on, would be treated by the jury, as a matter of course, as a credit and payment *pro tanto* unless in some manner the other party should disclaim or reject this allowance, which, considering only the matters then in issue, was for the apparent benefit of the latter. Under such circumstances, for Ebert to go on with the trial and submission of the case to the jury without renouncing that credit, must be deemed an acceptance of it,—a consent that it be allowed in his favor. No such disclaimer appears to have been made, and we find nothing in the case to oppose the conclusion to which the facts which we have stated naturally lead.

Treating this credit of \$794, on account of this plaintiff's interest

in the matter of the Hodsdon judgment, as having been allowed and taken into account in the former action with his consent, the conclusion follows that the recovery in this action, embracing the same matter, cannot be sustained. The plaintiff having once voluntarily realized the benefit of this claim in a manner then presumably satisfactory to him, and the other party having for this purpose relinquished from his own demand the amount thus allowed to the plaintiff, the latter cannot again recover upon the same cause of action. From the fact, recited in the judgment, that redemption has been made from the execution sale, it is apparent that the plaintiff's remedy in this action must be practically limited to a recovery of a share of the redemption money; and the judgment is to that effect. The practical result of the action cannot be different from what it would have been if redemption had been made before this action was commenced, and the plaintiff had sought in this action no other remedy than a recovery of a share of the redemption money. It can hardly be doubted that in such an action a recovery would be denied if it should appear that the amount which this plaintiff would otherwise have been entitled to receive had been allowed to him as a credit to offset or satisfy *pro tanto* other obligations in favor of this defendant, in the manner above shown.

The judgment must be set aside, and the order refusing a new trial reversed.

CHARLES W. MEAD vs. JAMES BILLINGS.

May 5, 1890.

Notice of Trial.—A party is entitled, as a matter of right, to notice of trial.

Same—After Appeal to Supreme Court.—After a cause on the calendar of the district court has been tried, and a verdict rendered, if the court grants an order for a new trial, from which the adverse party appeals to the supreme court, the cause must be again noticed for trial after an affirmation of the order appealed from, and the remanding of the cause to the district court.

Refusal to Strike from Calendar—Waiver.—A *right* to have a cause stricken from the calendar is not waived by participating in a trial after a refusal of the court to strike from the calendar or to continue the cause.

Appeal by defendant from a judgment (of \$1,005.46) of the district court for Hubbard county, *Holland, J.*, presiding.

A. G. Broker, for appellant.

Hartshorn & Coppernoll, for respondent.

DICKINSON, J.¹ This action, being on the calendar of the district court for Hubbard county, was tried at the May term, 1888. The plaintiff had a verdict. Afterwards the defendant moved for a new trial, and this was allowed by order of the district court. From that order the plaintiff appealed to the supreme court. The cause was heard in this court at the April term, 1889. The order appealed from was affirmed, (40 Minn. 505, 42 N. W. Rep. 472;) and on the 10th day of June, 1889, the mandate of this court was issued, remitting the cause to the district court, and was filed in the latter court June 14, 1889, three days before the commencement of the general June term of the district court. The cause was placed on the calendar for that term by the clerk of the court. No notice of trial was served for that term. At the opening of the court the defendant moved that the cause be stricken from the calendar of that term, for the reason that no notice of trial had been served. This was refused, and the cause was brought to trial June 18, 1889. The plaintiff again secured a verdict. The court refused a new trial, judgment was entered, and the defendant appealed therefrom. The statute (Gen. St. 1878, c. 66, § 218) provides that any time after issue, and at least eight days before the term, either party may give notice of trial. It provides for a note of the issue to be filed with the clerk, who is to enter the cause upon the calendar. It further provides: "The cause once placed upon the calendar of a term, if not tried at the term for which notice was given, need not be noticed for a subsequent term, but shall remain upon the calendar from term to term until finally disposed of, or stricken off by the court." The notice of trial is required to enable the adverse party to prepare for trial. It

¹ Mitchell, J., took no part in this case.

is a matter of right that this opportunity be given for preparation by notice, before a party can be compelled to go to trial, although, of course, this right may be waived.

The only question of practice here involved, concerning which we feel any doubt, is whether, a cause having been tried and a verdict rendered, the court having ordered a new trial, and an appeal having been taken from that order to the supreme court, the cause should remain on the trial calendar of the district court pending such appeal. We understand that the stay-bond provided for by statute was given, so that the power of the district court to proceed to the trial of the cause was suspended. The parties could not know when a decision of the supreme court upon the appeal would be rendered, nor, of course, could they know whether the order of the district court granting a new trial would be sustained or reversed. Hence they could not know whether the cause was to be again tried or not, nor, if to be tried, when the trial could be had. They should not, therefore, be required to be prepared for trial at any time and without notice. If no notice of retrial was required under such circumstances, a party might be compelled to go to trial on the very day of the cause being remanded to the district court, and this might be just as a term of that court was drawing to a close; and if the cause should be then called upon the motion of a party, and if the adverse party were absent, the case might be disposed of as upon his default. It would seem that some notice should be given in such cases, but the statute contemplates no notice, except the prescribed eight-days notice of trial; and, if any notice was necessary, that notice was necessary. In view of these considerations, and particularly of the fact that pending the appeal, the authority of the district court to proceed to a trial of the cause was suspended, and might never be revived, (as in the event of the order being reversed on appeal,) we are of the opinion that the statute to which we have referred should not be construed as contemplating no notice of retrial under such circumstances. It must be admitted that the proper construction of it is not very plain; but it seems to us that the provision that a cause shall remain on the calendar from term to term until finally disposed of was intended to apply to causes the trial of which should be pending in-

v.43M—16

that court, and which the court might try, and not to causes removed from that court by appeal to the supreme court, pursuant to a statute which, in effect, declared that, pending the appeal, and until the proper determination of the supreme court affirming the order appealed from, the district court should not proceed to the trial of the cause.

The defendant is not to be deemed to have waived his rights in the particular above referred to by reason of the facts that, after the denial of the motion to strike the cause from the calendar, he sought a continuance of the cause, and, that being refused, participated in the trial.

Judgment reversed.

43	242
45	342
43	242
48	21

MARIA B. NELL *vs.* MAY I. DAYTON and Husband.

May 7, 1890.

Requisites of Estoppel in Pais.—To create an equitable estoppel, the party claiming it must have done something, or in some way changed his position for the worse, in reliance upon the conduct of the other party, so that he will not be left, or cannot be put back, in his former condition, in case such other party is allowed to assert his original rights.

Same—Deed of Married Woman.—Assuming that a married woman may, by her conduct, be estopped from asserting her incapacity, by reason of her coverture, to execute a sole deed of her real estate, *held*, that the facts of this case were insufficient to create any such estoppel against the plaintiff.

Plaintiff brought this action in the district court for Hennepin county against defendant May I. Dayton and her husband, Lyman C. Dayton, (plaintiff's son by a former husband, Lyman Dayton,) to avoid the deed mentioned in the opinion. The defendants appeal from an order of *Young, J.*, refusing a new trial.

Shaw & Cray, for appellants.

S. A. Reed and Hale & Peck, for respondent.

MITCHELL, J. This action was brought to have a deed of certain

real estate, executed by plaintiff to defendant May I. Dayton, adjudged void on the grounds, *first*, that it was obtained by duress, and without consideration; and, *second*, that the plaintiff was a married woman, and her husband did not join with her in the conveyance. The court found that, while the means used by the defendant Lyman C. Dayton to induce plaintiff to execute the deed were unfilial and reprehensible, yet they did not in law constitute duress; but he further found that the deed was void because the plaintiff was a married woman, and her husband did not join in the conveyance. Gen. St. 1878, c. 69, § 2; *Place v. Johnson*, 20 Minn. 198, (219;) *Yager v. Merkle*, 26 Minn. 429, (4 N. W. Rep. 819;) *Tatge v. Tatge*, 34 Minn. 272, (25 N. W. Rep. 596, and 26 N. W. Rep. 121;) *Gregg v. Owens*, 37 Minn. 61, (33 N. W. Rep. 216.) The court also finds that no consideration was ever paid by the defendant, or received by the plaintiff, for the conveyance. The evidence is undisputed that the land was the property of the plaintiff; that at the time of the execution of the deed she was a married woman; and that her husband did not join with her in the conveyance.

The main contention of the defendants is that plaintiff is estopped by her conduct from asserting her coverture as a ground of avoiding her deed; and much of the argument of counsel is directed to the question whether a married woman can ever be thus estopped from asserting her incapacity, by reason of coverture, to execute a sole deed of her real estate. It is unnecessary for us to consider or decide this question; for, conceding that a married woman may be thus estopped, and assuming as true every fact favorable to the defendants which there is any evidence tending to prove, there is nothing in this case to create any such estoppel against the plaintiff. Taking as true that plaintiff concealed her marriage, and represented herself to the defendants as being a single woman, and that they received the deed under the belief that she was such, yet there is not a particle of evidence that the defendants, or either of them, ever paid any consideration for the deed, or have ever parted with anything of value for it, or in any manner changed their situation for the worse in reliance upon it. It is not pretended that defendants ever paid, or that plaintiff ever received, any monied consid-

eration for the conveyance. It is claimed, however, that it was executed in pursuance of the written contract, Exhibit I, the title being conveyed to May I. Dayton, instead of Lyman C. Dayton, at his direction, and that this contract shows a valuable consideration for the deed. It must be conceded that if Exhibit I had been a valid contract, which both parties had legal capacity to execute, the covenants and agreements therein contained to be kept and performed by Lyman C. Dayton would constitute a sufficient consideration for the deed. But it is an undisputed fact that plaintiff was a married woman when she executed this contract; and, it being one "for the sale of her real estate," she was under the same disability to execute it as she was to execute the deed.

It will be observed that this contract was, and, so far as the evidence shows, is still, wholly executory on part of Lyman C. Dayton. By its terms he was (1) to pay a mortgage on blocks 41 and 42; (2) to give a quitclaim deed of the balance of the property belonging to the estate of his father, Lyman Dayton, deceased; (3) not to probate "the second will and codicil" of Lyman Dayton. The evidence shows that defendant Lyman C. Dayton has never paid any part of this mortgage, but has allowed it to be foreclosed, and the premises to be sold in satisfaction of the mortgage debt. It also shows that he has never executed the quitclaim deed. The only thing he claims to have done or refrained from doing, in reliance upon either the contract or the deed, is that he took no steps to establish the so-called "second will and codicil of Lyman Dayton," and that a decree of court has been made refusing to admit it to probate. But there is not a particle of evidence that this instrument was valid or genuine; or, if so, that its provisions would have benefited him, or injured the plaintiff, had it been admitted to probate. The defendants stood in the case with it established that the deed by plaintiff was void, unless facts existed which would equitably estop her from asserting its invalidity; and the burden was upon them to affirmatively prove such facts. The consideration purported by the seal to the deed would not establish an estoppel. To support an estoppel there must be something more substantial than a mere technical or nominal consideration for the contract. An equitable estoppel is the effect of the

voluntary conduct of a party, whereby he is absolutely precluded from asserting rights which might otherwise exist as against another person, who has in good faith relied upon such conduct, and has been thereby led to change his position for the worse, and who, on his part, acquires some corresponding rights. The doctrine is founded upon equity and good conscience; and the party claiming the estoppel must have done something, paid something, or in some way changed his position for the worse, so that he will not be left, or cannot be put back, in his former condition, in case the other party is allowed to assert his original rights. Nobody ought to be estopped from averring the truth, or asserting a just demand, unless by his acts, words, or neglect his now averring the truth or asserting the demand would work some wrong to some other person, who had been induced to do something, or abstain from doing something, by reason of what he has said or done, or omitted to say or do. Nothing of this kind has been shown in this case. So far as appears, if this deed is held void, defendants will be left in precisely the same condition as they were before either it or the contract, "I," was executed; for it goes without saying that, if the contract referred to is in fact void as to plaintiff because of her coverture, the defendant is not bound to perform his part of it. In view of these facts, to say nothing of the objectionable means by which the deed was obtained, there exist no equities in favor of defendants which entitle them to invoke the doctrine of equitable estoppel against the plaintiff; and there was no evidence in the case which would have justified the court in finding facts sufficient to entitle them to do so.

Order affirmed.

MAY I. DAYTON vs. MARIA B. NELL, impleaded, etc.**May 7, 1890.****Power to Sell and Convey, how Conferred—Ratification by Parol.—**

The power to sell, as distinguished from the power to convey, real estate, may (in the absence of a statute to the contrary) be conferred or subsequently modified by parol. Where the power of attorney authorizes the agent both to sell and to convey, if the agent exceeds his authority as to the terms of sale, and executes a conveyance, (the power to convey being general and having no express limitation attached,) the deed is not absolutely void, but merely voidable, and the sale may be ratified by the principal by parol.

Same—Power from Husband and Wife—Modification by Wife.—A

power of attorney executed jointly by a husband and wife authorized the agent to sell the real estate of the wife "for such sums and at such prices as to him might seem meet," and "to make, execute, and deliver good and sufficient deeds and conveyances for the same." The agent, at the direction of the wife alone, conveyed the property without any consideration being received therefor. *Held*, that the conveyance was not void.

Appeal by plaintiff from a judgment of the district court for Ramsey county, where the action was tried by *Brill, J.*

J. M. Shaw, A. J. Shores, and Hawley & Hall, for appellant.

Alf. E. Boyesen, Horace Austin, and W. E. Hale, for respondent.

MITCHELL, J. As we view this case, there is only one of the questions discussed by counsel which we need consider. In September, 1878, the defendant Nell and her husband executed a joint power of attorney to Richard W. Johnson, authorizing him to sell all or any portion of the real estate belonging to either of them, "for such sums and at such prices as to him might seem meet," and to "make, execute, acknowledge, and deliver good and sufficient deeds and conveyances for the same." Subsequently Mrs. Nell gave to Johnson directions by letter (not under seal, and her husband not joining therein) to convey, without consideration, the tract of land now in dispute (which was hers) to her son Lyman C. Dayton. When Lyman C. called upon Johnson for the deed, he requested him to make it to his wife, this plaintiff. In pursuance of these instructions

from Mrs. Nell, and this request of Lyman C. Dayton, Johnson, as attorney for Mrs. Nell and husband, executed a deed to plaintiff, no valuable consideration therefor passing from plaintiff or Lyman C. to either Johnson or Mrs. Nell. Plaintiff thereupon went into, and has ever since remained in, possession under this deed. Mrs. Nell knew of the deed soon after its execution. Nell, her husband, died in 1881, since which time Mrs. Nell has remained single. In April, 1888, plaintiff brought this action to determine the adverse claim of Mrs. Nell, who in her answer asserts title in herself.

Defendant's contention is that the deed executed to plaintiff by Johnson is void because unauthorized by his power of attorney. The line of argument in support of this claim is substantially this: That a power to sell does not authorize a gift; that as a married woman can only convey her real estate, or authorize another to do so, by an instrument in the execution of which her husband joins with her, therefore the instructions given by Mrs. Nell alone to Johnson were ineffectual to enlarge his authority, and hence a deed without consideration, being unauthorized by the power of attorney, was absolutely void, and conveyed no title. From his conclusions of law it is evident that the trial judge adopted this view of the case, and on that ground ordered judgment for the defendant. While this reasoning is plausible, it seems to us fallacious. We think that both court and counsel may have fallen into error by failing to distinguish between a power to "sell" and a power to "convey," and by assuming that in such a power of attorney the two are one and indivisible. A person may give another authority to sell land without giving him authority to execute conveyances, or he may give him power to execute conveyances without the power to make sales, or he may give him power to do both. Authority to convey can only be given by deed, while authority to sell may be given by parol, and, until a recent statute, even verbally. It may be well to test the correctness of defendant's position by considering the consequences to which it would logically lead. Suppose the power is to sell for a specified price, and to execute a conveyance, but the principal subsequently, by parol, directs the agent to sell for a less price, which he proceeds to do, and executes a conveyance; or suppose the agent sells for a less

price without any such directions, and executes a conveyance, and the principal, with full knowledge of the facts, ratifies the sale by parol, as, for example, by accepting the purchase-money,—we think it would hardly be doubted but that in each of the cases supposed the deed would be valid and binding on the principal. But the necessary and logical result of defendant's position would be that in both cases the deeds would be absolutely void, and convey no title; for two of the oldest and most familiar rules of the common law are that authority to execute a deed can only be conferred by deed, and that an act of ratification must be of the same nature required for authorization. Therefore neither could the parol instructions of the principal confer authority to execute the deed, nor his parol acts subsequent to its execution operate by way of ratification to validate it. If valid at all, it must be because of the authority to execute it conferred by the original power of attorney. Indeed, if we carry defendant's contention to its strict logical consequences, it would follow that, where the power is to sell *and* convey, a conveyance by the agent where he did not make the sale, as, for example, where the principal himself made it, would be absolutely void, because not within the power. In the books the terms "void" and "voidable" are often used interchangeably, and in considering powers to sell and convey, where the attorney has exceeded his powers as to the terms of sale, the courts not unfrequently, and somewhat inaccurately, speak of the conveyances as not being in pursuance of the power, and hence void, and passing no title to the purchaser, when they merely mean that they are voidable by the principal. If they were "void," in the strict sense of the word, they would be incapable of ratification; for acts absolutely void cannot be ratified, while those that are voidable merely may be. We think the correct statement of the law is that the power to sell, as distinguished from the power to convey, may be modified or changed by parol, and that, where the power is both to sell and convey, (the power to convey being general and without limitation,) if the agent exceeds his authority as to the terms of sale, and executes a conveyance, the deed is voidable merely, and the sale may be ratified by parol. In the present case the power to convey was general. If Johnson exceeded his authority under his power of attor-

ney, it was as to the terms of sale, and this, we think, could have been authorized by the husband and wife by parol before the sale, or ratified by parol after it.

We think there is nothing in this view which at all impinges upon the statute relating to conveyances of the real property of married women. All that it requires is that the husband join with the wife in the conveyance. If they join in a power of attorney merely to execute conveyances, and the attorney execute a deed under this power at the direction of the wife alone, upon terms of sale dictated by her, we fail to see why this would not fulfil the requirement of the statute. It would neither conflict with its spirit, nor defeat its object; for, if the real estate of the wife be converted into personalty by the voluntary act of herself and husband, the proceeds are personal property, the disposition of which rests wholly in the wife, and over which the husband has no control. For example, had Johnson sold this land for a valuable consideration in money, Mrs. Nell could have disposed of it as she pleased. She might have made a gift of it to her son, or to any one else, without the consent of her husband. If in this case Johnson, in the terms of the sale, exceeded the authority given him in the power of attorney which Nell joined his wife in executing, we think the most that can be claimed is that it was voidable, at his election, in the exercise of that supervision and control which the law gave him over the disposition of his wife's real estate. Whether he could have done this it is unnecessary to consider, for he never did do so.

A point is made that in conveying to plaintiff, instead of her husband, Johnson departed from his instructions. There is nothing in this. If Lyman C. Dayton saw fit to have the deed made to his wife instead of himself, that is a matter that neither affected nor concerned Mrs. Nell. If the power of attorney itself had imposed such a limitation upon the authority to convey, a different question would have been presented.

Judgment reversed, and cause remanded, with directions to the district court to enter judgment for the plaintiff.

In re L. W. WHITE.

May 7, 1890.

Habeas Corpus—Conviction under Void Law.—If the law or ordinance under which a court assumes to convict is void, its judgment is not “a final judgment * * * of a competent tribunal,” within the meaning of Gen. St. 1878, c. 80, § 22, and the person imprisoned under it may be discharged from custody on *habeas corpus*.

Municipal Corporation—Ordinance for Licensing Peddlers.—The objections to an ordinance of the village of Pipestone, “to license hawkers, peddlers, and auctioneers”—*first*, that it delegates the power to license to the village recorder; *second*, that it delegates to the licensee the power to determine the time for which the license shall be granted; and, *third*, that the license fee is excessive: *held* not well founded, distinguishing the ordinance from that considered in *Darling v. City of St. Paul*, 19 Minn. 336, (389.)

Habeas corpus. The ordinance mentioned in the opinion is as follows:

“Sec. 1. Every person who shall sell or offer for sale any goods, wares, or merchandise, books, machinery, or other articles of value, or to barter or to exchange the same, at any place upon, along, or through the streets, avenues, alleys, or other public places of the said village of Pipestone, goes from house to house therein offering for sale any of said before described articles, shall be deemed a hawker or peddler; and it shall be unlawful for any such person or persons to exercise their said calling of hawking or peddling without first having obtained a license for that purpose as provided in section 2 of this ordinance.

“Sec. 2. License under the ordinance to hawkers or peddlers may be granted by the council of said village, or the village recorder, upon application, and the applicant therefor must first pay to the village treasurer the sum of three dollars per day for each day the said license is to run, and filing the treasurer's receipt with the recorder; and said recorder, if said application has been granted, shall issue a license therefor for the number of days that have been paid for as appears by such receipt; but no license shall be granted for a longer period than the date of the annual village election next ensuing after such date, and the sum of three dollars per day is hereby declared to be the fee to be charged for either a hawker's or peddler's license.”

(Sections 3 and 4 relate solely to auctioneers. Section 5 prescribes penalties.)

C. H. Childs, for petitioner.

F. L. Jones, for respondent.

MITCHELL, J. The relator, having been convicted of a violation of an ordinance of the village of Pipestone "to license hawkers, peddlers, and auctioneers," and having been committed under such conviction to the custody of the respondent, sues out a writ of *habeas corpus*, claiming that his imprisonment is illegal because the ordinance in question is void. If the law or ordinance under which a court assumes to try and convict is void, its judgment is not "a final judgment * * * of a competent tribunal," within the meaning of Gen. St. 1878, c. 80, § 22, and a person imprisoned under such judgment may be discharged from custody on *habeas corpus*. The validity of the ordinance is assailed, principally upon the authority of *Darling v. City of St. Paul*, 19 Minn. 336, (389,) on the grounds—*first*, that it delegates the power to license to the village recorder; *second*, that it delegates to the licensee the power to determine the time for which the license shall be granted; *third*, that the license fee is excessive; and, *lastly*, that the ordinance is in violation of the fourteenth amendment to the federal constitution. The second section of the ordinance is the only one here material.

1. As to the first objection, the ordinance is clearly distinguishable from the one considered in *Darling v. City of St. Paul*, *supra*. The latter delegated to the city clerk all discretion and authority in the matter of granting licenses, while the one now under consideration is fairly susceptible of the construction that the village council itself is to pass upon the question of granting or refusing the license, and that it is only the ministerial or clerical act of issuing it after the council has granted the application which is delegated to the village recorder. That such a mere clerical duty may be delegated to a ministerial officer cannot be doubted. *In re Wilson*, 32 Minn. 145, (19 N. W. Rep. 723.) But even if the ordinance means what relator claims, viz., that the application for a license may be granted by either the council or the recorder, the provision as to the recorder

may be held void, and yet the other provisions remain a complete and valid ordinance.

2. We do not understand the ordinance as leaving it to the licensee to determine the duration of the license. It contemplates that different persons may want licenses for different periods of time, and, in the case of hawkers and peddlers, usually for very brief periods; their practice being generally to work one town for a few days, and then go to another. Hence the ordinance establishes no fixed or uniform term for all licenses, but leaves that to be determined by the council in each particular case, subject only to a general limitation, and fixes the license fee, not on an arbitrary basis, but at the rate of so much a day for the time the license is to run. The council is not compelled to grant a license for any length of time the applicant may be willing to pay for. The final determination of that question is still with the village council. The reasoning upon that point in *Darling v. City of St. Paul* seems to us somewhat strained; but, assuming it to have been sound as applied to the facts of that case, the two ordinances are clearly distinguishable; for the supposed difficulty in the case of the St. Paul ordinance was that, under the construction placed upon it by the court, the license fee might exceed the limit fixed in the city charter.

3. In view of the character of the business proposed to be regulated, and the short periods for which such licenses usually run, we are unable to say that a fee of three dollars a day is excessive. As we said in *City of Mankato v. Fowler*, 32 Minn. 364, (20 N. W. Rep. 361,) what is a reasonable fee must depend largely upon the sound discretion of the city council, having reference to all the circumstances and necessities of the case, and that unless the amount is manifestly unreasonable in view of its purpose as a police regulation, the court will not adjudge it a tax. The arithmetic of relator, by which he estimates how much the fee would amount to, at this rate, for a year, is hardly in point. There is a clear distinction between the case of persons who are engaged the whole year in one place, in some permanent business, and that of hawkers and peddlers, who are transient, and usually remain only a short time in one place. What might be an excessive fee, estimated by the day, as to the for-

mer, might not be so as to the latter. The cost of issuing the license would be the same for the short term as for the long one, and the expense of police supervision (which may undoubtedly be taken into account in fixing the amount of the license fee) may be relatively much greater in the case of a temporary and transient business.

As to the point that the ordinance conflicts with the fourteenth amendment to the federal constitution, all that need be said is that it is predicated upon the assumption that, for the causes already considered, the ordinance is void. But if it is valid it cannot be said to deprive any one of his liberty or property "without due process of law."

Writ quashed, and the prisoner remanded to the custody of respondent.

STATE OF MINNESOTA *vs.* GERHARD H. THADEN.

May 9, 1890.

43	363
43	275
43	253
79	430
79	431

Witness—Privilege to Refuse Self-Criminating Testimony.—To entitle a person called as a witness to the privilege of silence, the court must see, from all the circumstances of the case, and the nature of the evidence which the witness is called on to give, that there is reasonable ground to apprehend that the evidence may tend to criminate him if he is compelled to answer. The danger to be apprehended must be real and appreciable with reference to the ordinary operation of law, in the ordinary course of things, and not imaginary or unsubstantial, or a mere remote and naked possibility.

Conspiracy—Evidence—Acts of one Conspirator.—Where two or more persons conspire together to commit any offence or actionable wrong, everything said, done, or written by any one of them, in the execution or furtherance of their common purpose, is to be deemed as so said, done, or written by every one.

Same—Issuing Forged Notes and Dividing Profits—Evidence—Statements by one Conspirator.—Where the common purpose of the conspirators embraced, not merely the putting off as true of forged promissory notes, but also the disposition of the fruits of the fraud and the division of the proceeds among themselves, statements by one of them,

made after the forged paper was issued, but before the disposition or division of the property obtained for it, with reference to future contemplated acts for the purpose of concealing the fraud so as to enable the conspirators to consummate the common purpose by disposing of the fruits of the crime and dividing the proceeds, are admissible against the other conspirators, although the statements also referred to a past act committed in execution of the conspiracy.

Appeal by defendant from an order of the district court for Ramsey county, *Brill, J.*, presiding, refusing a new trial.

Johns, Michael & Johns, for appellant.

M. E. Clapp, Attorney General, and *M. D. Munn*, for the State.

MITCHELL, J. The defendant was jointly indicted with two others (*Partello* and *Tall*) for forgery in the second degree, by putting off as true upon one *Christianson* a false and forged promissory note purporting to have been executed by one *Linstad*. He demanded and was granted a separate trial, and the state called, as a witness in its behalf, *Linstad*, the person whose name was alleged to have been forged. The first error assigned is the ruling of the trial court in compelling this witness to answer certain questions, he having previously declined to do so, claiming that the same might tend to criminate himself. While no principle of the common law is more firmly established than that which affords a witness the privilege of refusing to answer any question which will criminate himself, yet its application is attended with practical difficulties. To hold that the witness himself is the sole and absolute judge whether the answer will criminate him would be to place it in his power to withhold evidence whenever he saw fit. Such a rule could not be tolerated for a moment. On the other hand, to require him to state what answer he would have to give, or to explain fully how his answer would tend to criminate, would deprive him of the very protection which the law designs to afford. Moreover, the reason of the rule forbids that it should be limited to confessions of guilt, or statements which may be proved in subsequent prosecutions as admissions of facts sought to be established therein; but it should be extended to the disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt might be established, although the fact alone would not

indicate any crime. Hence the problem is how to administer the rule so as to afford full protection to the witness, and at the same time prevent simulated excuses. All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give. But the question on which the cases seem to differ is as to what we may call the burden of proof; some holding that the statement of the witness must be accepted as true, unless it affirmatively appears from the circumstances of the particular case that he is mistaken, or acts in bad faith, while other cases hold that, to entitle a witness to the privilege of silence, the court must be able to see, from the circumstances of the case and the nature of the evidence called for, that there is reasonable ground to apprehend danger to the witness, if he is compelled to answer. The following are a few of the leading cases treating of this subject: 1 Burr's Trial, 255; *People v. Mather*, 4 Wend. 229, 254; *Ward v. State*, 2 Mo. 120; *Kirschner v. State*, 9 Wis. 140; *Chamberlain v. Willson*, 12 Vt. 491; *Janvrin v. Scammon*, 29 N. H. 280; *Fries v. Brugler*, 7 Halst. 79, (21 Am. Dec. 52;) *Temple v. Com.*, 75 Va. 892; *La Fontaine v. Southern Underwriters*, 83 N. C. 132; *Reg. v. Boyes*, 1 Best & S. 311. The difference is theoretical, rather than practical; for it would be difficult to conceive of an instance where the circumstances of the case, and the nature of the evidence called for, would be entirely neutral in their probative force upon the question whether or not there was reasonable ground to apprehend that the answer might tend to criminate the witness. After consideration of the question and an examination of the authorities, our conclusion is that the best practical rule is that laid down in some of the English cases, and adopted and followed by Chief Justice Cockburn, in *Reg. v. Boyes*, *supra*, "that, to entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to an-

swer." To this we would add that, when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him. This, we think, is substantially what Chief Justice Marshall meant by his statement of the rule in the Burr trial. As was said in *Reg. v. Boyes, supra*, the danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law, in the ordinary course of things; not a danger of an imaginary or unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct. A merely remote and naked possibility, out of the ordinary course of the law, and such as no reasonable man would be affected by, should not be suffered to obstruct the administration of justice.

Applying this rule to the case at bar, it is very clear that no error was committed in compelling the witness Linstad to answer the questions. The sole object of the evidence sought to be elicited from him was to prove that his signature to the note was forged, and not genuine. For the purpose of proving this, counsel for the state exhibited the note to him, and asked if the name affixed was his signature. This the witness declined to answer, on the ground that it might criminate himself, and the court held that he need not answer the question. Counsel then, with the evident purpose of proving the same fact indirectly, asked the following questions: "Have you ever seen this note before?" The witness replied, "I refuse to answer that question, because it may criminate myself;" or, as subsequently expressed, "it might have a tendency to criminate myself." The court having ruled that he must answer, the witness replied, "Yes." Counsel then asked him, "When?" to which the witness interposed a claim of privilege in the same form as before, and, the court having again ruled that he must answer, he replied, fixing the time he had first seen the note at a date subsequent to the date of the alleged uttering by the defendant.

Whether the rulings of the court were consistent in sustaining the witness' claim of privilege as to the first question, and overruling it as to the other two, is immaterial. There was not a thing, either in

the circumstances of the case as then presented to the court, or in the nature of the questions, to suggest any reasonable apprehension of danger to the witness from being compelled to answer. The very nature of the offence charged against defendant negatived the idea of the witness' being a party to it, and there was nothing in the character of the evidence sought to be elicited from him that would reasonably suggest any real or appreciable danger that it would or could tend to inculcate him in any other offence. The answers themselves, when given, show that they had no such effect. It is also worthy of notice that witness did not state that his answers would criminate him, or even that he believed they would, but merely that they *may* or they *might* have that tendency. We might probably have rested the decision on this point alone.

The second and third assignments of error raise the same question, and may be considered together. It is claimed that the court erred in allowing one Eaklund, a witness for the state, "to testify to a conversation had by him with Partello or Tall and Partello, in the absence of defendant, concerning the so-called Christianson deal, at a time after the same had been consummated." The question involved in these assignments is what acts or declarations of conspirators are relevant and admissible against each other. The admitted rule is that, if two or more persons conspire together to commit any offence or actionable wrong, everything said, done, or written by any one of them, *in the execution or furtherance of their common purpose*, is to be deemed as so said, done, or written by every one, and is deemed to be a relevant fact as against each of them; but statements in the nature of a narrative of past events, after the conspiracy is ended and its purpose fully consummated or executed, as to measures taken in the execution or furtherance of any such common purpose, are not relevant, as such, as against any conspirators, except those by whom or in whose presence such statements are made. The testimony in the present case showed, or tended to show, that, at and prior to the time the forged note in question was put off on Christianson, the defendants Partello and Tall had entered into a conspiracy to commit a series of frauds, by putting off as genuine false and forged notes and mortgages; that they had sometimes used the name of Linstad

as the pretended maker of the instruments used to perpetrate these frauds; that this conspiracy contemplated and embraced, not merely the putting off as true of these forged instruments, but also the division among themselves of the proceeds of these frauds, and, impliedly at least, keeping secret their frauds until the common purpose was fully consummated; also that, as a part of this continuing conspiracy, all three were jointly engaged in putting off on Christianson the forged note in question, for which they had obtained from him a conveyance of certain real estate. It does not appear distinctly from the bill of exceptions that the statements of Tall and Partello to Esklund were made after the note in question had been put off on Christianson, and on that ground alone the assignments might be held not well taken. But, assuming the statements were made after the uttering of the note, the evidence shows that the conspirators had not yet disposed of the property obtained from Christianson, and consequently had not yet divided the fruits of the fraud, or paid Esklund his commission for introducing Christianson, which defendant had promised to pay when the property was disposed of. It also appeared that, to induce Christianson to make the exchange, the conspirators had represented to him that they had a party who would cash the notes, and that they were still keeping him quiet by putting him off from day to day with various excuses when he came after the money. When matters were in this situation occurred the statements of Partello, or Partello and Tall, to Esklund, the admission of which in evidence is complained of. The substance of these (after inquiring of Esklund if he knew where Linstad was) was that they had signed Linstad's name to the papers, and wished to see him about it. The fair inference is that the object was to make the matter right in some way with Linstad, and thus cover up the evidence of forgery, as a means of assisting in successfully carrying out the objects of the conspiracy, which, as we have said, was not confined to the mere uttering of the forged note, but extended to the disposition and division of the profits of the crime. Hence, although the statements referred to a past act, so far as the mere uttering of the note was concerned, yet they had reference also to contemplated future acts in furtherance of the common design, and were made while the conspiracy was still pending, and its

object not yet fully consummated. The statements were therefore relevant and properly admitted. *State v. Glidden*, 55 Conn. 46, (8 Atl. Rep. 890;); *Stewart v. Hanson*, 35 Me. 506; *Clinton v. Estes*, 20 Ark. 216, 225; *Scott v. State*, 30 Ala. 503; *Card v. State*, 109 Ind. 415, (9 N. E. Rep. 591.)

Order affirmed.

ROBERT ASHWORTH vs. NEWTON R. FROST.

May 12, 1890.

Action for Services—Evidence.—The evidence in this case examined and considered. Held to be sufficient to sustain the verdict.

Appeal by defendant from an order of the district court for Ramsey county, *Kerr, J.*, presiding, refusing a new trial after verdict of \$659.57 for plaintiff.

S. C. Biggs, for appellant.

Reynolds & Stewart, for respondent.

COLLINS, J. The only question for consideration here is as to the sufficiency of the testimony to sustain that part of the verdict in plaintiff's favor which was awarded, admittedly, upon his second cause of action as set forth in the complaint. This was for services alleged to have been rendered by the plaintiff in and about the purchase of certain real property for defendant, and at his request. From an examination of the testimony relative to this cause of action, it is evident that the order of the court below refusing a new trial must be affirmed. That defendant bought this property is undisputed, and there is no doubt but that the purchase was made by the plaintiff for him, although the evidence tends to show that the latter was to have an interest therein thereafter, and upon the payment of an agreed sum of money. The plaintiff testified in the most positive manner to a verbal promise made by defendant to compensate him for the services and in the amount alleged in the complaint; and the liability of the defendant to that amount was recognized in the written

agreement entered into between the parties, wherein, upon certain conditions, defendant contracted to sell and convey to plaintiff an interest in the realty, and to allow him, as part-payment therefor, the sum stated in the complaint, "for services heretofore rendered in purchasing" the same. The plaintiff also testified that when this contract was entered into, defendant orally promised to pay him the amount specified for services, in case he should be unable to purchase as he contemplated, and there is nothing in the written contract which indicates that, in case the plaintiff failed to comply with its conditions, the liability of the defendant to compensate him for his services no longer existed. Again, there was testimony tending to support the plaintiff's assertion that he was not in default upon the contract, but that the defendant refused to comply with its terms. Following the well-known rule of this court, in cases where there is testimony reasonably tending to support the verdict, the order appealed from is affirmed.

J. C. WOODARD vs. GRIFFITHS-MARSHALL GRAIN COMMISSION COMPANY.

May 12, 1890.

Bill of Exchange—Written Promise to Accept.—A promise in writing to accept a bill of exchange, made within a reasonable time before it is drawn, will amount to an acceptance of the bill in favor of a person to whom the promise is communicated, and who also takes the bill for a valuable consideration, on the faith and credit of the promise.

Same—Purchase of Bill in Reliance on Promise—Notice.—It is not essential that the written promise to accept be shown or exhibited to a person who takes the bill relying upon its existence; but, if he chooses to act without personally inspecting the promise in writing, he is held to have such information as he would have acquired by reading the same.

Appeal by defendant from an order of the district court for Hennepin county, *Lochren, J.*, presiding, refusing a new trial after a trial by the court and judgment of \$2,000 and interest ordered for plaintiff.

Stocker & Matchan, for appellant.

Wilson & Bowers, for respondent.

COLLINS, J. On January 11, 1889, the defendant corporation made its sight draft or bill of exchange for the sum of \$4,000, directed to one C. W. Seefield at St. Charles, Minn., and sold and delivered it to a bank in the city of Minneapolis, (defendant's place of business,) securing credit on its account with said bank for the amount thereof. The bank immediately forwarded this bill for collection to the plaintiff, a banker at St. Charles, by whom it was received January 14th. Plaintiff presented it to Seefield for acceptance on the same day, but it was not accepted or paid, the latter claiming that it was improvidently drawn, although, in fact, Seefield was then indebted to defendant in a sum greatly exceeding the amount of the bill. Before this, on the 12th of January, Seefield, having been notified of the making of the draft, wrote and wired defendant, requesting that it be recalled, and one for \$2,000 be made in place of it. To this defendant responded by wire, on January 14th, as follows: "Pay our draft for four thousand dollars to-day; then draw back on us for two thousand." Seefield immediately wired defendant: "Will pay draft and draw back, as requested." As soon as this telegram was received, defendant wrote Seefield, under date of January 14th, acknowledging receipt of dispatch and letter of the 12th in reference to recalling the draft, and saying, further, that it had received "your letter in regard to our draft, * * * to which we replied, 'Pay our \$4,000 draft, and make draft back on us for \$2,000;'" to which we received reply, 'Will pay draft and draw back, as requested.'" There was also reference to the balance due the writer, speedy payment being urged. This letter reached Seefield before the 17th, and on that day he made a bill of exchange for \$2,000, directing it to defendant corporation, as authorized. He then informed and communicated to the plaintiff the defendant's instructions and directions to draw the same, presented it to him for sale, the proceeds to be applied upon the larger draft, still in plaintiff's hands for collection. Relying upon the instructions and directions so communicated to him, plaintiff purchased the draft, paying its face value, applied the amount upon the other, Seefield paid the balance, and the full sum

was duly transmitted to the bank from which the collection was forwarded. Upon presentation of the draft so purchased by plaintiff, payment was refused, and the object of this action is to recover the amount from defendant. Upon a trial by the court, without a jury, judgment was directed, upon findings of fact, in plaintiff's favor, and the appeal is from an order refusing a new trial.

From the foregoing statement, it will be noticed that the plaintiff was only informed of the existence of the letters and telegrams. There was communicated to him the fact that, by means of correspondence, the defendant had directed and authorized Seefield to draw upon it for the sum of \$2,000, on payment of the bill which had been forwarded for collection. The letters and telegrams were not actually exhibited to plaintiff, but, in buying the draft made by Seefield, he acted and relied upon them and his information as to their contents. The appellant contends that this is not enough, but that, to enable respondent to recover, it is essential that the correspondence should have been shown to him, and that mere knowledge of its existence is insufficient. This contention is based upon the language, first found in this country in *Coolidge v. Payson*, 2 Wheat. 66, wherein the supreme court of the United States established the rule that, wherever it is necessary that an acceptance of a bill be in writing, a letter written within a reasonable time before or after the date of the bill, describing it, and promising to accept, is, "if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." This rule has been reiterated by the same court on several occasions, and has been followed by the state courts with great uniformity, although, at times, regret has been expressed that any other act than a written acceptance upon the bill itself had been declared sufficient. The appellant has cited a large number of cases wherein this rule has been stated in the same language, but in each the facts disclose either that there had been no communication of the contents of the letters, and hence the purchaser had not relied upon the same, or that the letters themselves had been shown. The expression upon which counsel relies, running through these cases, refers to the facts then before the courts, not to another and different state of affairs.

Here we have two essential elements fully established by the testimony—*First*, a written promise or virtual acceptance, admittedly sufficient under the authorities; and, *second*, the purchase of the draft for a valuable consideration, on the faith of the promise and acceptance. These are the material circumstances, and it is impossible to see why the information on which the respondent acted, and which was strictly correct, must needs be communicated to him in a particular way, such as the exhibition of the letters or telegrams. The appellant would have been in no different position on the trial of this case, if they had been actually shown respondent. It could not have been benefited in any practical way by his reading of the correspondence, nor has it been injured by the failure upon his part to do so. If a purchaser of drafts, made under like circumstances, neglects to inspect the writings, he incurs the risk of being imposed upon; but about this no one else need feel concerned. But the counsel for the appellant urges that any qualification of the rule as heretofore quoted would lead to the most alarming results to a commercial people, and that, under the one contended for by respondent, the recipient of a letter or telegram could make such representations relative to its contents as he might understand or infer, and thereby fasten the liability of an acceptor upon the writer of the communication. In reply to this proposition, it suffices to say that it is not the inference or understanding of the person who receives the communication which fixes the liability. That is determined by the writing. If it does not, in fact, contain the promise or acceptance, none exists.

Again, the counsel suggests, as an alarming result, should we adopt the views of the respondent, that nothing will prevent a person who has been authorized, in writing, to make a single draft, from stating its contents to an unlimited number of bankers, and selling to each a draft for the authorized amount. Should this be the case, it does not follow that the losses would be elsewhere than with the bankers, but, if it did, the counsel has overlooked the fact that he who receives such written authority might exhibit it to as many persons as he could orally communicate its contents to, and possibly more. The only way to completely prevent the result pre-

dicted by counsel would be to declare that, in addition to an exhibition of the written authority to the purchaser of the bill, it must be attached to and follow the draft to the person upon whom it is made, the promisor. This, the counsel will admit, has never been laid down as necessary. We think it fully established that a promise in writing to accept a bill of exchange, made within a reasonable time before it is drawn, will amount to an acceptance in favor of the person to whom the promise is communicated, and who takes the bill for a valuable consideration, on the faith and credit of the promise. 3 Kent, Comm. *85; *Bank of Michigan v. Ely*, 17 Wend. 508; *Scudder v. Union Nat. Bank*, 91 U. S. 406; *Lewis v. Kramer*, 3 Md. 265; *Clarke v. Cock*, 4 East, 57. That the promise be made, (and in writing, wherever a written acceptance is required,) and that it be made known and communicated to one who, upon the faith of the promise, purchases the bill, are the material circumstances which fix the liability. So far as we are able to find from an examination of the authorities, it has never been held, in cases where this precise question has been raised, that the written promise and authority must be shown the purchaser. The paramount inquiry has been as to its existence, and as to the purchaser's knowledge of and reliance upon it, when taking the draft.

It is further urged that the plaintiff cannot recover, because the draft for \$4,000 was not paid on January 14th. The telegram of that day, from appellant to Seefield, was, "Pay our draft to-day, and then draw upon us for \$2,000;" while in the letter written upon the same day, in response to Seefield's dispatch that he would pay the bill and draw back as requested, the words "to-day" were omitted from that part which purports to state *verbatim* the language of the message. The respondent, although not shown the correspondence by wire and mail, must be held to have all the information which he would have obtained by a personal inspection of the same. The draft upon Seefield was presented upon the 14th, and, with three days of grace, matured upon the 17th, the day on which the bill in dispute was made. A reading of the various communications between Seefield and appellant would not have indicated to respondent, or to any ordinary business man, that, as a condition to Seefield's right

to draw for \$2,000, he was required to meet the draft upon him on the 14th, or in any way, except according to its tenor, and in the usual course of business. The intention to restrict Seefield's authority in the manner now contended for does not appear from an examination of all of the letters and telegrams.

Order affirmed.

STATE OF MINNESOTA *vs.* MADOLYN FRELINGHUYSEN.

May 12, 1890.

Criminal Trial—Challenge of Juror—Questions on Voir Dire.—Upon the trial of defendant for the crime of receiving stolen property, a person was called as a juror who knew that the accused was the keeper of a brothel. In response to a question the juror had answered upon his *voir dire* that his knowledge of defendant's occupation had not prejudiced him against her, and that he was absolutely impartial as to the pending charge. Defendant's counsel then asked the question that if, upon the trial, her business should be shown, and the evidence in the case was such as to leave in the juror's mind a reasonable doubt as to her guilt, would he be able to give her the benefit of such doubt. The court sustained an objection to this question. *Held*, that this ruling was not erroneous.

Same—Improper Remarks of Counsel—Objection, how to be Taken.

When counsel in their arguments to the jury make remarks which are foreign to the case, are unwarranted by the testimony, and are calculated to prejudice a party in the minds of the jurors, the attention of the court should be called to the objectionable language, and a ruling obtained. This may be done at the time the words are used, or when the jury is charged upon the law applicable to the pending issues. An exception to the remarks of counsel simply, is insufficient to raise the question on appeal.

Appeal by defendant from a judgment of the district court for Ramsey county, where the action was tried before *Wilkin, J.*, and a jury.

Hawes, Lemen & Dungan, for appellant.

Moses E. Clapp, Attorney General, and *J. J. Egan*, for the State.

COLLINS, J. The defendant was indicted for the crime of receiv-

43	265
40	461
43	265
81	48

ing stolen property. At her trial one Casey was called as a juror, and challenged by the defence for actual bias. Upon the *voir dire* the defendant's counsel disclosed the fact that the proposed juror had, through a newspaper article, learned the business of the defendant, which was that of keeping a house of ill-fame. Casey was then asked, more than once, whether his knowledge of the character of the business in which defendant was engaged had created a prejudice in his mind so that he could not sit in the trial of the case at bar as an absolutely impartial juror. He repeatedly, and apparently with candor, answered that he was not prejudiced against defendant, and was absolutely impartial. The counsel then asked that if, upon the trial, defendant's business should be shown, and the evidence as to the pending charge was such as to leave in the juror's mind a reasonable doubt as to guilt, would the juror be able to give to the accused the benefit of that doubt. To this question the state objected, and the court sustained the objection. The juror was sworn. The ruling was correct. The question had in substance been answered. The juror had stated that a knowledge of the defendant's business had not prejudiced him against her, and that he was absolutely impartial. If so, he would try the case upon the merits, wholly unbiased by the fact that the accused followed a disreputable occupation, and with due regard to the instructions of the court, which would, of course, include one as to reasonable doubt. Again, the record here does not show that the defendant was prejudiced by reason of the disallowance of the challenge. Without going so far as we might under the cases therein cited, we call attention to *State v. Lawlor*, 28 Minn. 216, (9 N. W. Rep. 698.) See, also, *Hayes v. Missouri*, 120 U. S. 68, (7 Sup. Ct. Rep. 350;) *Hopt v. Utah*, 120 U. S. 430, (7 Sup. Ct. Rep. 614.)

The counsel for the state, when making his closing argument to the jury, used the following words: "Conscience smote! A woman who was keeping a house of ill-fame, who searches the market for new victims, who sends her recruiting sergeants out to lure young and innocent girls." From the bill of exceptions it clearly appears (as might be expected if the testimony was confined to the issue) that there was nothing before the jury which indicated that, as the

keeper of a brothel, defendant had pursued the very reprehensible practice attributed to her by the prosecuting officer. There was no testimony which would warrant the accusation made, or which could have justified a line of argument so foreign to the case in hand. We realize that allowance must be made for intemperate and unfair allusion by zealous counsel, engrossed in the trial of an action, but the language here used exceeded the bounds of legitimate argument, should not have been indulged in, and may, as the counsel now insist, have been prejudicial to their client. But, admitting all this, the record shows that the defendant's counsel did nothing more than to except to the remarks when they were made, while the only assignment of error in reference thereto is that the court erred in permitting the argument to proceed without reprimanding the attorney for using such language. The trial court was not called upon to make a ruling of any kind. It did not decline to completely and thoroughly cover the error by an instruction. The only complaint is that it did not, of its own volition, interrupt and reprimand the counsel while engaged in his argument. The court was not at any time requested to make a ruling whereby the impression which the defendant's counsel now claims may have obtained with the jurors, to her prejudice, by reason of the unwarranted comment upon her conduct, might have been corrected. This should have been done, either at the time the objectionable words were used, or when the court came to its charge to the jury. The exception to the remarks of the public prosecutor, although coupled with the alleged error of the court in failing to reprimand him at the time of the occurrence, is insufficient. It does not properly present the question which has been argued.

Judgment affirmed.

**ROBERT STEWART vs. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY
COMPANY.**

May 12, 1890.

Master and Servant—Negligence—Evidence. — Testimony in the case examined, and *held* sufficient to warrant the verdict.

Appeal by defendant from an order of the district court for Stearns county, *Searle, J.*, presiding, refusing a new trial after verdict of \$2,000 for plaintiff.

M. D. Grover, for appellant.

D. W. Bruckart, for respondent.

COLLINS, J.¹ This action was brought by plaintiff, who was employed by the defendant as a brakeman, to recover for injuries alleged to have been received through the negligence of an engineer also in defendant's employ. The jury found for the plaintiff, and defendant appeals from an order denying a new trial. The accident occurred in the night-time; the engineer who is said to have been negligent then having charge of a switching or yard engine standing upon the main track, and in front of which a caboose-car was coupled. It became necessary to open a side track a short distance for the purpose of taking out another caboose-car. A brakeman who was working with the plaintiff turned the switch, and with his lantern gave a "slow" signal. This the engineer understood, and, pushing the car in front of the engine, came slowly over on to the side track. As the moving car and engine approached the caboose which was to be taken out, plaintiff, in the line of his duty, stepped in and made the usual preparations for coupling. When within about two feet of the stationary caboose, the car and engine came to a full halt, and were then put in motion. The draw-heads of the caboose came together, catching and crushing the plaintiff's hand. From testimony which was undisputed, it appears that the engineer knew that the caboose in his front was to be coupled to that upon the side track, and that plaintiff

Mitchell, J., took no part in this case.

had gone between them to make the connection. It also seems that, when his engine stopped, he knew the cabooses to be but about two feet apart, and that, under the rules governing the movement of locomotives, the one in question should not have then been started up without further signal from the brakemen. The testimony of the plaintiff and his witnesses was, in substance, that no signal was given except at the switch; that, instantaneously after coming to a full stop, the car and engine were suddenly, with great force and violence, started up, and thrown forward upon the stationary car, whereby plaintiff's hand was caught and mangled between the draw-heads. The sufficiency of this testimony to sustain the verdict is really the only question presented upon the appeal.

In defendant's behalf, there was testimony that the engine was properly handled, when, during a momentary halt, the engineer applied steam, having, as he claims, received from one of the brakemen another signal to move ahead slowly, and that the cars came together with little or no force, and in the usual manner. There was also put in evidence the result of a number of experiments in car-coupling under precisely the conditions existing when plaintiff was hurt, made with the same engine and upon the same tracks. From this the defendant contends that it was conclusively established that the accident did not result, and could not have resulted, from the carelessness or negligence of the engineer. We cannot so hold. The weight of all the testimony was for the jury, and there was sufficient on the part of the plaintiff to show that his injuries were caused by the mismanagement of the engineer, and that they might have been averted, had due care been used by him.

Order affirmed.

CHARLES A. BARROWS vs. W. S. THOMAS.**May 13, 1890.**

Usurious Renewal Mortgage—Replevin by Mortgagee—Claim to Recover under Original Mortgage.—In an action to recover personal property, the plaintiff, by his pleadings, placed his asserted right to recover solely upon a specified mortgage of the property from the defendant to the plaintiff. The defence of usury being interposed, the inquiry upon the trial of that issue extended to the question of usury in a prior note and mortgage, in renewal of which the later (junior) note and mortgage had been given. The junior note and mortgage having been found to be usurious, but the senior note and mortgage being free from it, *held*, that the plaintiff was not entitled, in this action, to recover the property under the senior mortgage. The right to recover under that mortgage was not in issue nor litigated.

Appeal by plaintiff from an order of the district court for Pope county, *C. L. Brown, J.*, presiding, (acting for a judge of the 7th district,) granting a new trial.

Knute Nelson and Chas. P. Reeves, for appellant.

L. T. Storey and T. T. Ofsthun, for respondent.

DICKINSON, J. This is an appeal by the plaintiff from an order granting a new trial. The action was for the recovery of personal property; the plaintiff's right of possession, as set forth in his complaint, and as expressly admitted in his reply, being based upon a mortgage to him of the property in question, executed by the defendant in March, 1888, as security for a promissory note of the mortgagor made at the same time. The answer alleged that the note and mortgage were usurious. Upon the trial evidence was presented to the effect that the note and mortgage of March, 1888, were given in renewal of a former note of the defendant, made in May, 1887, which was secured by a chattel mortgage upon a part of the property in question, namely, a steam thrasher engine and feed-mill. That former mortgage was received in evidence, but under objection, and the question whether that former note was usurious was litigated. The court instructed the jury that if it should be found that the later note

and mortgage involved usury, but that the prior mortgage was free from it, then, under that prior mortgage, the plaintiff would be entitled to recover the engine and feed-mill. The court was right in granting a new trial. It appearing that the mortgage under which alone the plaintiff asserted a right to the property was given to secure a note which was a renewal of the former note, an inquiry as to whether that former note was affected with usury was relevant to the issue; and so the parties seem rightly to have treated the case. But there was nothing in the course of the trial to justify the conclusion that the defendant consented to litigate the question, not involved in the pleadings, whether under the mortgage of 1887 the plaintiff was entitled to the possession of the engine and feed-mill. The defendant was not called upon, either from the nature of the pleadings or from anything occurring at the trial, to interpose any defence which he might have to a claim of a right to take the property under that first mortgage. That mortgage may have been released by the mortgagee. If such a defence, or any other, existed as respects the right of the plaintiff to take the property under that mortgage, the defendant was not required to present it in this action.

Order affirmed.

E. J. ECKART and another *vs.* PAUL ROEHM, Administrator.

May 13, 1890.

Purchase by Agent, when not Binding on Principal.—The rule of law that a principal is not bound by the acts of an agent which were not authorized, and which the other party was not justified in believing to have been authorized, applied in the case of the purchase of goods on the credit of the principal.

Same—Ratification.—The fact that the agent so purchasing the goods applied them to the payment of debts of the principal to other persons, without his consent or knowledge, the agent having been provided with funds for the payment of such debts, does not make the principal liable.

Plaintiffs brought this action in a justice's court for Clay county, and recovered a judgment of \$139.39. An appeal, on questions of

fact and law, to the district court for Clay county was tried by *Mills, J.*, (a jury being waived,) who ordered judgment for defendant, which was entered, and the plaintiffs appealed.

Taylor & Greene, for appellants.

W. B. Douglas, for respondent.

DICKINSON, J. The defendant, as administrator of the estate of a deceased person, was in possession of, and carrying on, a farm in this state. He, residing in another state, employed an agent to take charge of the farm. The agent was authorized to employ, pay, and discharge farm laborers. He was not authorized to purchase goods on credit except from certain merchants, not including the plaintiffs, with whom the defendant had personally made arrangements for the sale of such goods as the agent should desire to purchase for farm use. The agent purchased clothing of the plaintiffs for the men employed on the farm, on credit of the defendant. The agent, on settlement with the laborers, deducted the price of the goods from their wages. The defendant had no knowledge of the transaction until afterwards, when the agent was found to be indebted to him in the sum of \$600 on account of money received as foreman. It may be added that the plaintiffs knew that the agent was purchasing goods from the other merchants above referred to, but they did not learn this from the defendant; nor did they make inquiry, nor, so far as appears, did they learn under what agreement such purchases were made, or that they were made on credit.

The case was correctly decided. The agent had not, in fact, any authority to purchase these goods from the plaintiffs on the defendant's credit, and there could be no recovery upon the ground of actual authority. Nor does it appear that the defendant's conduct, or the authority actually given to and exercised by the agent, justified the plaintiffs in assuming, without inquiry, that the agent had a general authority to purchase such goods, and on credit. The plaintiffs did not even know, so far as appears, that the agent had before purchased any goods on credit, or that he had authority to do so.

There was no such voluntary acceptance by the defendant of the benefit of these sales as to preclude his defence that the same were unauthorized. From the fact that the agent paid the farm laborers

in goods thus purchased without authority on the credit of the defendant, instead of with the money in the agent's hands provided for such purposes, it can hardly be said that the defendant has received the benefits of the transaction. He knew nothing of it, and cannot be deemed to have ratified a transaction which he knew nothing about until after its completion, and concerning the results of which he then had no control.

Judgment affirmed.

STATE OF MINNESOTA vs. J. B. TALL.

May 18, 1890.

Criminal Trial—Refusal of Witness to Criminate Himself.—*State v. Thaden*, *supra*, p. 253, followed, as to right of a witness to refuse to testify on the ground that his testimony might criminate himself.

Same—Cross-Examination by Party of his own Witness.—The court may, in its discretion, allow a party surprised by adverse or evasive testimony from his own witness to ask him whether he had not previously stated the facts contrary to his testimony, if the circumstances justify the belief that the witness is hostile and unwilling to tell the truth.

Same—Evidence—Harmless Error.—The formal receiving of newspapers in evidence, although unnecessary for the purposes of the case, *held* not to be prejudicial error, the same not having been read to the jury.

Same—Variance as to Initial of Middle Name.—The variance between an indictment and the proof, as to an initial standing for one of the Christian names of the person alleged to have been injured, Peter J. being used where it should have been Peter C., is immaterial.

Same—Privileged Communication to Attorney.—Asking a witness on cross-examination whether he had ever communicated to his attorney a fact to which he had testified, is not a violation of the rules as to privileged communications.

Same—Impeachment of Witness by his own Letter.—A letter which a witness had previously written to another, and which might fairly be construed as expressing a purpose to testify to a fabricated state of facts, *held* receivable in evidence for the purpose of impeaching the witness, after he had testified to such facts.

Same—Motion to Strike Out held too Broad.—A motion to strike out *all* the testimony of a witness, some of such testimony, at least, being not subject to the reason upon which the motion was based, *held* properly refused.

Same—Forgery—Sufficiency of Evidence.—Evidence *held* sufficient to justify a conviction for forgery.

Same—New Trial—Newly-Discovered Evidence.—On a trial for forgery, the state called as a witness the person whose name was alleged to have been forged. The defendant, by objections, opposed a full disclosure by the witness as to relevant facts bearing upon the question of the genuineness of his signature. The witness also claimed to be privileged from answering questions bearing upon that issue, which claim of privilege was in part allowed by the court. After conviction a new trial was sought, principally on the ground that the defendant desired the testimony of that witness upon that point; it appearing, also, that the latter proposed to waive his privilege. *Held*, that the motion for a new trial was properly refused, both because of the defendant's opposition to the testimony sought to be elicited from the witness on the trial, and because the court was justified, from the nature of the witness' testimony, in the conclusion that he was not an honest witness.

Appeal by defendant from an order of the district court for Ramsey county, *Kerr, J.*, presiding, refusing a new trial.

Johns, Michael & Johns, for appellant.

M. E. Clapp, Attorney General, and *M. D. Munn*, for the State.

DICKINSON, J. The defendant Tall was indicted with two others, Partello and Thaden, for forgery in the second degree. He had a separate trial. The offence set forth in the indictment consisted of the disposing and putting off, to one Christianson, of a forged mortgage note purporting to have been executed by one Christian P. Linstad, and payable to the order of one Herrick, the defendants knowing the same to be forged. The note was dated September 5, 1888. The offence is charged to have been committed on the 8th of March, 1889. The state called as a witness Linstad, whose name was subscribed to the note as the maker. He having refused to answer the question whether the signature was his, on the ground that to do so might tend to criminate himself, he was then asked when he first saw the note, and testified that he first saw it in the spring of 1889, and,

as he thought, in the month of March. He testified also to having seen an article published in the St. Paul Daily Globe (newspaper) in regard to the Christianson deal. He then refused to answer (upon the same claim of privilege) whether it was before or after he saw that article that he first saw or heard of this note. Being required by the court to answer, he responded that it was after he saw that article in the newspaper. Copies of that newspaper for the month of March were produced in court by the state, identified, and offered in evidence. The witness was shown an article in the issue of March 14th, but he testified that it was not the article referred to by him. The claim here made, that it was error to have compelled this witness to answer questions in respect to which he claimed his privilege, is not sustained. The reasons for this are fully stated in our decision in *State v. Thaden, supra*, p. 253, which was a separate trial of one of the joint defendants under this same indictment.

It was a proper matter of discretion for the court to allow the prosecuting attorney to ask this witness whether he had not on a former occasion made a statement to him contrary to the testimony of the witness, in a matter relating to the identity of the newspaper article referred to, and in this the court did not err. The testimony of the witness had been such as to justify the court in the opinion that he was an unwilling witness, hostile to the state; and in such a case we think it the better opinion that the court may allow questions of this kind to be asked, in the nature of a cross-examination, not for the purpose of discrediting the witness, but as a proper means of inducing him to tell the truth, when his conduct justifies the belief that he is disposed to conceal it. *Bullard v. Pearsall*, 53 N. Y. 280; *Melhuish v. Collier*, 15 Q. B. 878; 1 Greenl. Ev. § 444.

There was no prejudicial error in receiving the evidence relating to the newspaper article referred to by the witness. His testimony being that he never saw or heard of the note bearing his name as maker until after the publication referred to in his testimony, the date of that publication became material. The evidence was directed to showing that the alleged maker of the note knew nothing of it until after it had been put off upon Christianson. It is true that the contents of these newspapers were not material beyond what

might be necessary for the identification of the article referred to by the witness, and to prove the time of its publication. While it may be that it was unnecessary for this purpose to put in evidence all the papers published in the month of March, we do not understand that these papers, or any of them, were read to the jury, or even any article that had been published in them. If there was any error, it could not have prejudiced the case of the defendant, even though it be conceded, as claimed by the defendant, that this evidence failed to establish the fact to the proof of which it was directed.

The variance in respect to the name of Christianson, the person alleged to have been injured,—the indictment giving the name as Peter J., while the proof showed it to be Peter C.,—was immaterial. *Stewart v. Colter*, 31 Minn. 385, (18 N. W. Rep. 98;) *Miller v. People*, 39 Ill. 457.

The question asked of the defendant's witness Partello, as to whether he had communicated to his attorneys a fact to which he testified, was proper on cross-examination. Whether or not he could have been required to disclose a fact by being compelled to state what he had said to his attorneys, the reason of the rule relating to privileged communications is not applicable with respect to a fact which the witness testifies to directly. The privilege belongs to the client, and not to the attorney, and where the client testifies to the fact in question there can be no reason, in general, why he may not be required to testify as to whether he had communicated that fact to his attorney.

The letter of the defendant's witness Partello to Linstad (Exhibit K) was properly received in evidence. It was impeaching evidence against the witness of the strongest character, not because its contents were contradictory to his testimony, but because it embodied a detailed proposal by Partello to Linstad as to the evidence which should be presented in defence to this charge of forgery, and because this proposal or suggestion as to the defence to be made (and which was in substantial accord with the testimony of this witness) bears on its face the strongest marks of a mere fabrication of what should be testified to. The writer expressed the belief that it would be better to "stick to the same old defence," which he proceeds to

set forth, including what the *person addressed* had wanted, what he *knows*, what he told the writer in respect to signing the notes, and so on, concluding with a request for an answer, if this "suits you."

In the latter part of the trial, the defendant's counsel moved to strike out all the testimony of the witness Linstad, because, as it was said, it then appeared that the witness' claim of privilege had been well founded. It is sufficient to say of this that the privilege of the witness was personal to himself. He had given considerable testimony in the case without asserting his privilege, and the defendant was not entitled to have all this stricken out, even conceding that the witness might have been privileged from giving such testimony.

It is urged that the evidence of forgery was insufficient to justify a conviction for that offence. We deem it to have been sufficient. We will only here refer to some of the prominent features of the case. Tall and Partello were partners in real-estate business in St. Paul. The circumstances of the transaction connected with putting off this note and mortgage upon Christianson were such that there can be no doubt that it involved a conspiracy between Tall, Partello, and Thaden to defraud Christianson of certain real estate by securing a conveyance of it in exchange for worthless notes secured by a worthless mortgage. Partello, called as a witness for the defendant, testified as to the circumstances relating to the signing of the note, declaring that he signed Linstad's name by the authority of the latter, verbally given prior to the signing of the note. Without here setting forth particularly this testimony of Partello, we do not hesitate to say that it was so unreasonable, and the witness was so self-impeached, that the jury were unquestionably justified in finding that while the fact, thus shown on the part of the defendant, that Linstad did not sign the note, was true, yet that this account of a signing by Partello by Linstad's authority was a complete fabrication. Then there was the testimony of one Esklund, that, very soon after the note had been put off on Christianson, Tall, being in the company of Partello, said to the witness: "We used his [Linstad's] name up there, and want to tell him, so there wont be any kick about it; we used his name in that transaction,"—referring to the Christianson matter. The further circumstance that the note was dated as of a time long prior to

that when it was made, was worthy of some consideration in this connection. Tall's testimony in his own behalf, to the effect that he never saw the note until the Thaden trial, and in respect to other matters, which in view of other evidence in the case the jury were at liberty to reject as false, may have been justly deemed by the jury to weigh against him, and to strengthen the conclusion to be drawn from other evidence that he was guilty of the offence charged. Whether the evidence in the case when the state rested was sufficient to have supported a conviction need not be considered. *Cole v. Curtis*, 16 Minn. 161, (182.)

The application for a new trial was based in part on affidavits showing that the witness Linstad, subsequent to this trial, and on the trial of Partello, had waived his privilege, and had testified fully as to the execution of the notes, and to the effect that he had authorized Partello to sign his name to the notes. The affidavit of Linstad was also presented, in which he said he would waive his privilege, and that the fact was as above stated. Another affidavit set forth a conversation with Linstad prior to March, 1889, in which he stated that Partello had authority to sign his name in transacting business in reference to real estate which they were interested in. A counter-affidavit was also presented, setting forth statements made by Linstad contrary to what the defendant claims he would testify to. The court was justified in refusing to allow a new trial, so that Linstad's testimony might be more fully presented, for at least two reasons: *First*, because in the trial in this case, when Linstad was called as a witness by the state, and interrogated concerning the matter in question, the defendant, by his counsel, objected repeatedly to questions directed to eliciting the facts concerning the execution of the note. The court was fully justified by the case in believing that the defendant then knew what the facts were in that regard, and which the witness knew as a matter of course. Having objected to such testimony when it was offered on the trial, his application for another trial deserves not much favor, so far as it rests upon the desire to produce the testimony of Linstad upon this question. Again, apart from the affidavits presented on the part of the state, we think that the court was justified in believing from the testi-

mony of Linstad, as given in this case, that he was not an honest witness, whose testimony, if given as proposed, would be worthy of much credit.

Order affirmed.

JUDSON JONES vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

May 16, 1890.

Evidence—Form of Question to Expert.—The trial court may permit a question to an expert witness, calling for his opinion, to refer him to the testimony in the case, if he has heard it, instead of stating the facts it tends to prove; but in such case the question must require the witness to assume the testimony to be true.

43	279
54	383
43	279
62	218
43	279
68	62

Same—Opinion of Physician.—A physician may give his opinion of the physical condition of a patient after an examination of him, though it be based in part on the statements of the patient made at the time, as to his sufferings and symptoms.

Carrier—Injury to Passenger in Baggage-Car—Contributory Negligence.—The fact that a passenger on a railroad is, when injured, in a baggage-car, in which, by the rules of the company, passengers are not permitted to be, is not negligence on his part that will defeat his recovery, unless it contributed to or aggravated the injury.

Same—Rule Habitually Disregarded.—The fact that a railroad company has a rule prohibiting passengers being in its baggage-cars does not absolve it from the duty of care towards passengers who are in a baggage-car, if it habitually disregards the rule, and permits passengers to ride in such cars. Following *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn. 110, (125.)

Action brought in the district court for Blue Earth county, to recover damages for personal injuries. At the trial, before *Severance, J.*, the plaintiff introduced evidence tending to prove the following state of facts: One of defendant's regular way trains was a mixed train, and on October 16, 1886, this train was made up of 21 freight

cars and a "combination" car, divided by a cross partition into two compartments, one for passengers and one for baggage. This car had steps and a door at each end, and a door in the partition between the two compartments. When the train reached Lake Crystal, the combination car was detached and left standing in front of the station, and the rest of the train was run into the yard for the purpose of switching cars to and from it. The plaintiff, having purchased a ticket for passage from Lake Crystal to Brown Centre, entered the combination car by the steps at the end of the baggage compartment, (which was the rear end and nearest to the station,) and was passing through it to the passenger compartment, when he stopped, near the middle of the baggage compartment, to listen to the conversation of two men in that compartment. While he was thus standing in the baggage compartment, the rest of the train was backed down to be coupled to the combination car, and struck the latter car with such force that plaintiff received a "severe wrench or twist," causing him to feel as if he "was broken in two across the groin and the lower part of the back," and he had all he could do to keep from falling. The injuries resulting to plaintiff from the shock were (among others) incomplete inguinal hernia and a debility precluding him from speaking at length as required by his vocation of preacher and temperance lecturer. Dr. Daniels, a witness for plaintiff, who had made several examinations of him, was asked whether, judging from such examinations, "including what the plaintiff said in such examinations relative to his condition," the plaintiff was suffering from disease or injury to the spinal cord. The question was allowed, against defendant's objection, and the defendant excepted. Dr. Warner, being called as a witness for defendant, having testified that he had heard the testimony of plaintiff's medical witnesses as to the hernia, was asked the following question, which, on plaintiff's objection, was excluded, the defendant excepting: "Taking the testimony of these witnesses, having in mind what it shows as to this difficulty having progressed, considering this testimony, what have you to say as to the probable progression of it? What is the probability as to this difficulty developing into a complete hernia, under ordinary circumstances?"

The defendant also introduced evidence tending to prove that a rule of the company prohibited passengers from entering the baggage compartment, and that a printed copy of this rule was posted there; but it did not appear that plaintiff saw or knew of the rule, and there was evidence that passengers used the baggage compartment as a smoking-room.

The plaintiff had a verdict of \$2,000, and the defendant appeals from an order refusing a new trial.

James H. Howe and Lorin Cray, for appellant.

Daniel Buck and Horace Austin, for respondent.

GILFILLAN, C. J. In the various hypothetical questions put by the plaintiff to his expert medical witnesses, to elicit their opinions, we do not find that any fact was assumed that there was not evidence in the case fairly tending to prove. The rule is that for the purpose of a question to an expert witness, to call out his opinion, the party may assume as facts what the evidence tends to prove; and we do not see that the plaintiff was permitted in any instance to depart from this rule. The question in such a case usually states the facts assumed to be proved. Strictly, perhaps, it ought to. But for convenience the court may, and often does, permit the hypothesis to be put by referring the witness to the testimony if he has heard it, instead of stating the facts. But in such case the question must require the witness to assume the testimony to be true, and not leave it for him to determine whether any of it be true or not; for that would commit to him the function of the jury. In this particular the question to the defendant's witness Dr. Warner was objectionable. It neither stated the facts as the basis for his opinion, nor did it require him to assume the testimony which it referred to, and on which his opinion was asked, to be true. It left him to determine what of it he should consider true, and what false. It was therefore properly excluded.

When a physician is called on to determine upon the condition or ailment of a patient, he must oftentimes do so, of necessity, from what the patient tells him of his present physical sufferings or symptoms. In many cases it would be impossible to prove what the ailment is, if such statements of the patient be excluded, or if the physi-

cian may not testify to his opinion, based in part, at least, on the statements of the patient. For this reason, statements of an injured person of present pains or symptoms (when the question of his then condition or ailment is in issue) are always competent. The question asked plaintiff's witness Dr. Daniels was proper.

If, as the jury has found, and as the evidence justified it in finding, the negligence of the defendant caused the injury to plaintiff, the fact that he was at that time in the compartment of the car devoted to carrying baggage, and that it was against the rule of the company for passengers to be there, would not necessarily prevent a recovery. His presence there would not, of itself, be contributory negligence that would bar his right to recover. Negligence on the part of a person injured will not have that effect unless it contributed to his injury. It is difficult to see from the evidence how the fact that plaintiff when injured was standing in the compartment of the car used for baggage, instead of in the compartment used for carrying passengers, tended to cause or aggravate the injury. The shock to the car which caused the injury must have been as great in one part of the car as in another. We cannot say that it is negligence in one taking passage on a railroad car to stand for two or three minutes (the car standing still at the time) instead of at once taking a seat. In this case, certainly, these were questions for the jury. Nor can it be said, under the evidence in the case, that the plaintiff was wrongfully in the baggage compartment of the car, so that the defendant did not owe him the duty of care which a common carrier of passengers owes to his passengers. Even though there was a rule of the defendant posted up in the baggage compartment forbidding passengers to be there, if it was not enforced, if the defendant, through its servants in charge, habitually disregarded the rule, and permitted passengers to be and ride in that compartment, so that a passenger might assume the rule to have become obsolete,—it certainly could not treat him as a wrong-doer for passing through it to reach that part of the car appropriated to passengers. *Jacobus v. St. Paul & Chicago Ry. Co.*, 20 Minn. 110, (125.) There was evidence from which the jury might find this condition of things. The jury found specially that the rule was not in force at the time, which, read in

connection with the evidence, must mean that the rule posted up was not enforced, but was disregarded by the defendant and its servants. This being so, it was immaterial that plaintiff had or had not notice that such a rule had been posted up. No other point in the case requires special mention.

Order affirmed.

PETER REDIN vs. H. S. BRANHAN, impleaded, etc.

May 16, 1890.

Action to Cancel—Mortgage—Parties—Cestui Que Trust.—The *cestui que trust* is not a necessary party to an action by a third person to reach the trust property.

43	283
52	373
43	283
65	120

Same—Assignor of Mortgage.—The assignor of a mortgage who covenants that it is unpaid is not a necessary party to an action against the assignee to have the mortgage adjudged to have been paid prior to the assignment.

Same—Assignment of Mortgage Paid but not Satisfied of Record.—The assignee of a paid mortgage of real estate takes it subject to the defence that it has been paid, although it is not satisfied of record.

Same—Action by Purchaser at Foreclosure Sale.—A second mortgagee, though he has foreclosed under the power of sale, he having become the purchaser, may, notwithstanding the time to redeem has not expired, bring an action to have a prior mortgage adjudged paid.

Appeal by defendant Branhan (impleaded with August Sallberg and wife) from a judgment of the district court for Meeker county, where the action was tried by *C. L. Brown, J.*, acting for the judge of the 12th district.

Kueffner & Fauntleroy, for appellant.

U. L. Lamprey and *P. W. Locke*, for respondent.

GILFILLAN, C. J. So far as necessary to the decision of this case, the facts are, in brief, these: March 19, 1884, the defendant August Sallberg and one Lichtenauer were the owners of certain real estate, and executed a mortgage thereon to Gustav Willius to secure

the sum of \$6,000, according to the terms of certain promissory notes, which mortgage was duly recorded. Lichtenauer then conveyed his interest in the real estate to Sallberg. After the recording of that mortgage and that conveyance, and on March 3, 1885, Sallberg executed a mortgage on a part of the real estate to plaintiff to secure the sum of \$4,000, which mortgage was duly recorded. May 27, 1887, Willius assigned his mortgage to one Johnson, and June 6, 1887, Johnson assigned to the defendant Branhan; this last assignment containing a covenant that there was \$5,000 still owing on the mortgage. Both these assignments were duly recorded. Before the assignment to Johnson the notes which the mortgage to Willius was given to secure were overdue, and they had been fully paid. August 12, 1887, plaintiff foreclosed his mortgage under a power of sale contained in it, and at the sale became the purchaser. After this, Branhan commenced a foreclosure of the Willius mortgage under a power of sale contained in it. These facts are alleged in the complaint, and found by the court below upon a trial. The action is to enjoin defendant's foreclosure proceedings, and have the Willius mortgage adjudged paid and satisfied.

The defendant Branhan at first demurred to the complaint on the grounds that it does not state facts sufficient to constitute a cause of action, and that there is a defect of parties defendant, in that Johnson and the National German-American Bank should have been joined as defendants. The demurrer was overruled, and Branhan answered. Passing the point made by respondent, that, by answering, the appellant waived his right to complain of the decision on his demurrer, we do not see any basis for the suggestion that either the bank or Johnson ought to have been made a party defendant. As to the bank, it appears, both by the complaint and the findings of fact, that the notes and mortgage were executed to Willius to secure an indebtedness due to the bank, and also an indebtedness due to another firm, and when collected Willius was to pay the amount collected upon such indebtedness. The most that can be claimed upon this is that Willius was trustee for the bank and the other firm, and that first Johnson, and then Branhan, upon receiving an assignment of the notes and mortgage, became trustee. The *cestui que trust* may

be a proper, but he is not a necessary, party to an action by a third person against the trustee to reach the trust property, or to set aside or cancel the trust-deed. *Winslow v. Minn. & Pacific R. Co.*, 4 Minn. 230, (313.) The bank was therefore not a necessary party. The only claim that Johnson was a necessary party must be based on the fact that in his assignment to Branhan he covenanted that there was a certain amount due on the notes and mortgage. But after he had assigned the notes and mortgage he was no party to them; he had no interest, legal or equitable, in them; he could not be bound by the judgment, unless he should be required by Branhan, under the covenant, to defend the action; and in that case he might defend in the name of Branhan, without being a party to the record. His case is not materially different from that of a grantor of real estate who warrants the title. He would not be a necessary party to an action by a third person against his grantee to recover the property.

The point is made by appellant that, although the notes and mortgage had been paid, the latter, not being satisfied of record, is good as to Branhan, a purchaser for value and without notice. How he could be a *bona fide* purchaser after the notes, by their terms, were past due, it is hard to see. But conceding that he might be, the point is fully covered by the decision in *Johnson v. Carpenter*, 7 Minn. 120, (176,) followed in *Hostetter v. Alexander*, 22 Minn. 559, in which it was held that a mortgage is "a mere chose in action as between the mortgagor and any subsequent assignee, and is taken subject to the state of accounts between the mortgagor and mortgagee at the time of the assignment." As between the mortgagor and an assignee of the mortgage, the record of the assignment does not affect the rights of the former as they existed between him and the mortgagee at the date of the assignment; and it was decided in those cases that this was so, even where the assignee took as indorsee the notes secured by the mortgage, free from all equities between the maker and payee. The decisions in *Palmer v. Bates*, 22 Minn. 532, and *Merchant v. Woods*, 27 Minn. 396, (7 N. W. Rep. 826,) were based on the proposition that where a mortgagor has given to the mortgagee a power of sale in the mortgage, and permits him to exercise it, although the mortgage has been paid or released, of which he gives no notice by

the record or otherwise, and at the foreclosure an innocent person purchases, the mortgagor, and not the purchaser, must bear the consequences. The cases were not essentially different from one where a person has placed on record a power to another to convey his real estate, and afterwards executed a revocation which he does not put on record, and in ignorance of which an innocent person takes a conveyance executed by the attorney. In this case, had the William mortgage been foreclosed under the power, and an innocent person purchased, the case would be like those. The purchaser would not be the purchaser of a mere chose in action, as an assignee of the mortgage is, but a purchaser of land under the power. Those decisions were consistent with *Johnson v. Carpenter* and *Hostetter v. Alexander*. The assignees of this mortgage took it subject to the defence that it had been paid.

The doctrine was at one time that no one could maintain an action to clear a cloud upon the title to real estate but the owner of the legal title in possession, and this rule is laid down in *Frost v. Spitley*, 121 U. S. 552, (7 Sup. Ct. Rep. 1129.) But the weight of modern authorities is that possession is not necessary. This court so held in *Donnelly v. Simonton*, 7 Minn. 110, (167.) Appellant claims that this is strictly an action to remove a cloud, and that such an action can be maintained only by the legal owner. We will not say there may not be actions of that character which only one having the legal title can bring. But the proposition stated as a general rule applicable to all actions in the nature of bills *quia timet*, whether their object be to cancel instruments which are void or become *functus officio*, or to clear off a cloud created in any other way, is not only not sustainable upon authority, but is not supported by the reason which lies at the basis of such actions. That reason is that the party has no adequate remedy at law, and that to require him to await the action of the party claiming under the instrument or other matter constituting a cloud, until perhaps his evidence and ability to defend against it is lost by lapse of time, would, in many cases, be to deny him any remedy. The reason is as forcible in the case of one having only an equitable estate, or merely a lien, as in that of the legal owner. It has been held that the action may be maintained by a mortgagee in possession,

(*Polk v. Reynolds*, 31 Md. 106;) by a mortgagee under a mortgage with a power of sale, (*Wofford v. Board of Police*, 44 Miss. 579;) by a grantor who has conveyed with covenants of title,—*Ely v. Wilcox*, 26 Wis. 91; *Chamblin v. Slichter*, 12 Minn. 181, (276.) And in *Churchill v. Proctor*, 31 Minn. 129, (16 N. W. Rep. 694,) we held that the mortgagee of a leasehold estate in bringing his action to foreclose might have relief against a fraudulent attempt of his mortgagor and the lessor to forfeit the leasehold interest. It could hardly be claimed that he could seek such relief, not in an independent action, but only when he brought his action to foreclose. Actions by judgment creditors to avoid fraudulent conveyances are familiar instances. So one who has purchased land for a valuable consideration, but the conveyance to whom is void for failure in some statutory requirement, may bring suit to clear off a cloud created by his grantor conveying to another, (*Doe v. Doe*, 37 N. H. 268;) so may one who has an equitable title by a contract to convey to him. *Kimberly v. Fox*, 27 Conn. 307. If in any case any one but the legal owner may maintain the action, this plaintiff ought to maintain it, and not be compelled to wait until the Willius mortgage has been foreclosed, and the rights of others, perhaps innocent purchasers, have become involved.

Judgment affirmed.

PETER SCHMIDT vs. EUGENE MCCARTHY.**May 16, 1890.**

Several unimportant assignments of error disposed of.

Plaintiff built an addition to a house of defendant's daughter-in-law, Mrs. Timothy McCarthy, on her land, and brought this action in the district court for Stearns county, to recover \$450, the value of his labor and material, on the ground that the contract therefor was made by defendant, by Mrs. Timothy McCarthy as his agent. The latter having testified that defendant agreed with her that he would have the addition built, and that he told her to go and see plaintiff and have the work done, and that she was to repay him when she was able, was asked the following questions by defendant, each of which was excluded, the defendant excepting: "Were you to give Mr. McCarthy your note or anything for this money?" "You had some money that was due Mr. McCarthy. Didn't the defendant direct you to keep the money and pay it to Mr. Schmidt?" Plaintiff had a verdict for the full amount claimed, and the defendant appeals from an order refusing a new trial.

Taylor, Calhoun & Rhodes, for appellant.

Hubert Hansen, for respondent.

GILFILLAN, C. J. There is no merit in either assignment of error. Even had defendant been technically entitled, as a part of his cross-examination of the witness Mrs. McCarthy, to ask the questions which the court below excluded, it is apparent that he could not have been prejudiced by their exclusion. They were so manifestly immaterial that no conceivable answers that the witness might have made could in any way have affected the result.

Order affirmed.

ELLEN O'MALLEY, Administratrix, vs. ST. PAUL, MINNEAPOLIS & MAN-
ITOBA RAILWAY COMPANY.

May 16, 1890.

43	289
46	87
43	289
46	236
47	164
43	289
51	198
43	289
72	344
673	55

Negligence—Duty of Owner of Dangerous Machinery to Young Children.—The owner of any machine which he knows to be dangerous to children too young to know the danger, and of too immature judgment or discretion to control their natural instinct to amuse themselves with anything that may attract them as a plaything, and which he knows or ought to know may attract them, and who knows it is so placed that it does attract them to play with it, is under a duty, as to such children, to exercise the degree of care which an ordinarily prudent person would use to prevent its injuring them.

Same—Question for Jury.—What that degree of care requires him to do is ordinarily a question for a jury.

Same—Proof of Due Care—Use of Customary Precautions.—While, in the case of its turn-tables and trucks standing on its tracks, by playing with which such children are injured, it is competent for a railroad company, in order to show that it exercised due care, to prove that it secured the turn-tables and trucks in the way customary with all railroad companies, such proof is not conclusive that due care was exercised.

Same—Contributory Negligence of Parent—Pleading.—Defendant, sued for injuries to a child through its negligence, denied, in its answer, the negligence charged, and alleged contributory negligence of the child and others who accompanied him. *Held*, this limited its right to prove contributory negligence to that pleaded, so that it could not prove negligence of the child's mother in allowing him to go upon defendant's grounds.

Other unimportant assignments of error disposed of. Evidence *held* sufficient to sustain the verdict.

Appeal by defendant from an order of the district court for Stevens county, *C. L. Brown, J.*, presiding, refusing a new trial after a verdict of \$3,000 for plaintiff, in an action for the negligent killing of her intestate, a child of six years.

M. D. Grover and *J. W. Mason*, for appellant.

Spooner & Spooner, for respondent.

v.43m.—19

GILFILLAN, C. J. This is an action by an administratrix to recover for an injury causing the death of the intestate, through the negligence of the defendant. Upon the trial there was no substantial conflict in the evidence as to the material facts in the case. The uncontradicted evidence may be said to establish the following facts: The railroad of defendant runs through the village of Morris, in this state. Upon one of the blocks of that village are located several of defendant's tracks, running through the block, its cattle-yard, elevator, coal-sheds, a shop for repairs, a turn-table, and, shortly before the accident, a round-house, but which had been burned down. The turn-table was near the centre of the block, being 422 feet from the street bounding the block on the north, 578 feet from the street bounding it on the south, 225 feet from that bounding it on the east, and 125 feet from that bounding it on the west. On the north side two tracks, running north and south, ran to the turn-table; on the south side, one track running in nearly the same direction, and, connecting with the main track, ran to the turn-table. On one of the tracks running to the turn-table stood several sets of car-wheels, with the axles. It seems to have been customary with defendant, for a considerable time before the accident, to leave car-wheels standing at that place. The track on which they stood had a descending grade towards the turn-table. The grounds were not inclosed, so that they appear to have been easily accessible to boys, and boys of all ages seem to have been accustomed to seek them for the purpose of amusing themselves with the turn-table and the wheels, by revolving the one and setting the other in motion along the track. The defendant knew this, and had instructed its employes at work upon and about the grounds to drive the boys away whenever they came, and they had generally, though not always, done so, whenever they saw the boys there. The turn-table, when not in use, was fastened with an iron latch let down into a socket. One of the witnesses testified that any child, a boy of five or six years old, could raise out the latch. The wheels were fastened to prevent them rolling with a chip or block, sometimes with a tie or piece of timber. At the time of the accident in question three boys, two about nine years old each, and the deceased about six years old, went upon

the grounds, removed the chip or block put to fasten one set of wheels, and put them in motion towards the turn-table. Deceased placed himself in front of the wheels, endeavoring to stop them, but they pushed him back, so that he was caught between one wheel and one of the timbers of the turn-table, and crushed so that he died not long after. The turn-table was partly turned round, and must therefore have been unfastened. It may be taken
 x as established by the evidence that the methods adopted for fastening the turn-table and the wheels were those ordinarily used by railroad companies.

The case is, in its main features, nearly analogous to *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207. The principal difference in the facts of the two cases is that in that case the turn-table was left unfastened, while in this, as the jury might from the evidence have found, though the turn-table was usually kept fastened, and perhaps was fastened on this occasion, and though the wheels were undoubtedly fastened, the fastenings were insufficient to prevent children who come within the protection of the rule in that case from easily removing them. The difference is not such as necessarily to
 x take the case out of the rule; for if one who has on his own premises a dangerous machine, which he knows to be accessible to and resorted to by children of too tender years to know the danger, and of too immature judgment or discretion to control the natural instinct of a child to amuse itself with anything that may attract it as a plaything, is under a duty to exercise care to prevent injury to such a child, the fact that he uses some care is not of itself sufficient to absolve him from liability. The care he must exercise is that which an ordinarily prudent person would, under similar circumstances, use to prevent injury to such children. Whether in any particular case such degree of care has been used is, generally, a question for the jury. Whether any care is required of the owner of a machine, and, if so, what an ordinarily prudent person would do in the way of care, must depend upon the circumstances of the case. To impose the duty of care, the
 x machine must be such that it is dangerous for very young children to play with or about it, it must be of such a character that such children would naturally be attracted to play with or about it, and it

must be where they are likely to come for that purpose, so that an ordinarily prudent person would anticipate that they might come for that purpose. If the owner, instead of preventing such children getting to it, relies, to prevent injury to them, upon fastening it so as to prevent their playing with it, it is evident that the character of the means used for fastening must be considered in determining whether he exercises the care required of him. If the means used make it impossible for such children to expose themselves to the dangers of the machine, of course the owner has done his duty. On the other hand, if such means have no tendency to prevent them so exposing themselves; if they are entirely futile, and leave the machine just as dangerous to such children as before,—it can hardly be said he has used the degree of care required of him. To illustrate, suppose the case of a turn-table so situated that the company is under a duty, in respect to very young children, to secure it so as to avoid as to them the danger which it must guard them against, to wit, that to which they are exposed by the revolving of the turn-table, and that the company adopts a means of securing it so simple and easy of removal that it furnishes no obstacle in the way of the children playing with and causing the turn-table to revolve. Such children, seeing others cause the turn-table to revolve, imitate such others, and do the same. They see others remove the fastenings; they imitate them, and do the same. Certainly, the mere fact that it used some fastening would not, without regard to the character of the fastening, absolve the company from liability. Whether the fastening used was such as an ordinarily prudent person would use to prevent injury to such children must be a question of fact for the jury.

As we held in the *Kolsti Case*, (*Kolsti v. Minn. & St. Louis Ry. Co.*, 32 Minn. 133, 19 N. W. Rep. 655,) it was competent, on the issue as to proper care, for the defendant to prove that it fastened the turn-table and the wheels in the way customary among railroad companies. But, although that evidence was proper for the jury to consider on that issue, it was not of itself conclusive. *Doyle v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 79, (43 N. W. Rep. 787.) For the common sense of the jury might inform them that the means ordinarily used for such purposes are not adequate to guard against the dangers

to be avoided; that, in respect to such dangers, the means of prevention used by railroad companies generally are not such as an ordinarily prudent person would use to guard against the same dangers,—in other words, that all railroad companies may be habitually negligent in respect to those dangers. There is, certainly, no conclusive presumption that they are not. We do not mean to intimate, in respect to the matter of fastenings in a case like this, that they must be such as to render it impossible for children to remove them, nor that the fact that in the particular case they were removed by such children necessarily makes a case of negligence. But they ought to be such (we are speaking of cases where very young children, to the knowledge of the defendant, have ready access to, and may be attracted by, turn-tables and car-wheels standing on the tracks) that an ordinarily prudent person would deem them sufficient to render it improbable that children within the rule would remove them.

The child was injured at the turn-table. The evidence indicates that the turn-table was partly turned. It is not clear that the injury was not in part caused by that condition. It was proper, therefore, for the court to admit evidence as to the manner of fastening it, and also to refuse to instruct the jury that its position and condition were immaterial.

The answer denied the alleged negligence of the defendant, and alleged that the death was caused "solely by the wrongful act, negligence, and carelessness of the deceased and others, who were wrongdoers and trespassers upon the premises of defendant, and who wrongfully, and without the knowledge of defendant, but contrary to its orders, were upon said turn-table and its premises, and set said axle and wheels in motion." This clearly refers only to deceased and the two boys who were with him. On the trial defendant offered to prove negligence on the part of the child's mother in permitting her child to go upon the defendant's grounds, and about the turn-table and tracks. This was excluded. Two requests of defendant to instruct the jury, based on the proposition that the mother was negligent, were refused. That, in case of injury to a child *non sui juris*, the contributory negligence of the parent is imputed to the child, was de-

cided in *Fitzgerald v. St. Paul, M. & M. Ry. Co.*, 29 Minn. 386, (13 N. W. Rep. 168.) That, under a general denial in an answer of an allegation of negligence on the part of the defendant, the latter may prove negligence of the plaintiff contributing to the injury complained of, was held in *St. Anthony Falls Water-Power Co. v. Eastman*, 20 Minn. 249, (277.) It may be assumed that, had defendant rested on its general denial of negligence on its part, the evidence offered would have been admissible. But a party, by pleading specifically, though it may not have been necessary for him to do so, may restrict his line of proofs to the specific matters pleaded. Thus, in many cases, a general allegation of title will admit proof of any title the party may have; whereas, if he plead a specific title, or one acquired in a particular way, he will be limited in his proofs to the particular title pleaded. And so if one charged with negligence, instead of relying upon what he might prove under a general denial, should specify the particular in which he claims plaintiff's negligence contributed to the injury, he would, no doubt, be limited in his proofs to the particular pleaded. Otherwise pleadings might be made misleading. As the issue was not presented by the pleadings, and as it does not appear that plaintiff, by consent, litigated it as though it were in the pleadings, the instructions refused were inapplicable, and were properly refused.

The evidence made the case a proper one for the jury, and, though the damages were large, they are not so excessive as to show that any improper motives influenced the jury.

Order affirmed.

DICKINSON, J., (*dissenting*.) I think that the condition of the turn-table did not constitute a ground upon which liability on the part of the defendant could have been found. The only circumstances to be considered in this connection were that the turn-table was left in such a position that the revolving track did not, perhaps, connect with either of the two stationary tracks, and that the table may have been unfastened. The fact that it was not fastened bears no proximate relation to the accident or injury, if it was not set in motion by the boys, but remained motionless and stationary. If it had been fast-

ened in the same position the results would have been the same. As to the position of the turn-table, it was not the duty of the defendant to leave it connected with one of these stationary tracks rather than with the other, or with either of them. It could not be connected with both tracks. This position had nothing to do with the boys coming there to play, or with their setting the wheels in motion. The probability that injury would result from leaving the turn-table in that position seems to me to have been too remote to allow culpable negligence to be assigned because of it. The act was blameless, unless that was to be reasonably apprehended. I see no justification for a conclusion that injury was more likely to occur from the turn-table being left in this position than if in any other position. For these reasons I think that the refusal of the defendant's eighth request was error. 273 ...

COLLINS, J. I concur in the views of Justice Dickinson.

MARTIN HENRY and another vs. HENRY A. BRUNS.

May 16, 1890.

43	996
43	396
43	295
67	411

Failure to File Security for Costs—Objection, how to be Taken.—

When a non-resident plaintiff has not filed security for costs, defendant may make the objection only by motion, not by answer.

Failure to Serve Statement of Account Sued on—Remedy of Defendant.—That a plaintiff has failed to serve, on demand, a copy of his account, is not matter for answer, but only of objection to evidence of the account when offered.

Security for Costs—Filing *nunc pro tunc*.—The court may allow a non-resident plaintiff to file security for costs *nunc pro tunc*, after the action is commenced.

Action brought in the district court for Clay county, to recover \$99.56 and interest. After service of the answer, (the substance of which is stated in the opinion,) the plaintiffs obtained an order to

show cause why they should not be allowed to file security for costs *nunc pro tunc*, and why they should not thereupon have judgment on the pleadings. After a hearing before *Mills, J.*, it was ordered that plaintiffs have leave to file the security tendered by them, and that upon such filing they have judgment as prayed in the complaint unless the defendant serve an amended answer within 10 days after service of a copy of the order. From this order the defendant appealed.

R. R. Briggs, for appellant.

Burnham & Tillotson, for respondents.

GILFILLAN, C. J. The defendant, for answer to the complaint, alleged that plaintiffs are non-residents, and have not filed the security for costs required by statute; and that he demanded in writing a copy of plaintiffs' account, and they did not serve the same within the time required by statute. Neither of these is proper matter of answer. Neither goes to the jurisdiction of the court, or is a defence to the cause of action. For failure to file security for costs, the remedy is pointed out by Gen. St. 1878, c. 67, § 20. It is by motion for a stay of proceedings or for a dismissal. The remedy for failure to serve a copy of the plaintiffs' account is indicated by section 105, c. 66. It is by objection to proof of the account when offered at the trial. Where a non-resident plaintiff has omitted to file security for costs before commencing his action, the court may undoubtedly allow him to file it *nunc pro tunc*. The answer being irrelevant, the plaintiffs were entitled to move for judgment as for want of an answer. Section 99, c. 66. The defendant complains that the leave to answer granted him by the order was limited to 10 days. As he had no right to answer again, and the leave given him to do so was matter of grace, he cannot be heard to complain.

Order affirmed.

NOTE. The cases of *Butts v. Moorhead Mfg. Co.*, *Wadham's Oil & Grease Co. v. Bruns*, and *Woolfolk v. Bruns*, presented the same questions, and were argued at the same time with the foregoing case, and by the same counsel, and with the same result.

CHARLES E. SAWYER vs. HARVEY J. HARRISON.

43	297
167	95

May 19, 1890.

Action to Avoid Fraudulent Conveyance—Requisites of Complaint
—Who may Sue.—In an action to set aside a conveyance executed in fraud of creditors, the complaint must state facts showing that the plaintiff occupies a *status*, either as creditor or as the representative of creditors, which entitles him to assail the conveyance. A mere general allegation that the plaintiff was by order of court appointed "receiver" of all the property belonging to the grantor in the conveyance is not sufficient.

Appeal by defendant from an order of the district court for Polk county, *Mills, J.*, presiding, overruling his demurrer to the complaint.

Knute Nelson, for appellant.

A. A. Miller, for respondent.

MITCHELL, J. In an action to set aside a conveyance executed in fraud of creditors, the plaintiff must, in his complaint, state facts showing that he occupies a *status* entitling him to assail the conveyance on the ground of the fraud; that he himself is a creditor, or that he occupies a representative capacity which gives him the right, in behalf of creditors, to assail it. None but creditors, or those whom the law recognizes as their representatives, can assail such conveyances. The grantor himself cannot do it. Neither could his heirs, assigns, or personal representatives do so, being considered as merely standing in his shoes. But by statute the executor or administrator of an insolvent estate, the assignee of an insolvent debtor under a general assignment for the benefit of creditors, or the assignee or receiver of the property of such a debtor under the "insolvent law," and a receiver appointed in proceedings supplementary to execution, are authorized to maintain such actions; they being considered, for such purpose, the representatives of the creditors prosecuting the action in their behalf. But they must allege the facts giving them this right. In the present case the only allegation in the complaint, in that regard, is that the plaintiff was, "by order of this court made

and now on file in the office of the clerk thereof, appointed receiver of all the property of every kind belonging to Fred Buse," the grantor in the conveyance assailed. But the word "receiver" is a very general term. There are a great many kinds of receivers, appointed in a great variety of suits and special proceedings, for many different purposes, and clothed with very different powers. *Prima facie*, and as a general rule, a receiver succeeds to and is vested with only the rights and property of the person over whose estate, or some part thereof, he is appointed, and does not hold or acquire the right to maintain an action to set aside a conveyance made by the person over whose estate he has been appointed which the grantor himself could not have maintained. If he is a receiver of such a kind as would make him the representative of creditors, and authorize him, as such, to maintain an action to set aside a conveyance executed in fraud of their rights, it must be so alleged in the complaint. There is no such allegation in this case, and the demurrer should have been sustained on the ground that the complaint did not state a cause of action.

Order reversed.

MORRIS H. FLARSHEIM vs. FRED BRESTRUP.

May 19, 1890.

Application of Payments.—After acquiescing in the application of a payment in extinguishing one demand, and accepting the benefit of it for that purpose, a debtor cannot avail himself of the same fund to extinguish another demand, although, when he made the payment, he directed its application on the latter.

Power of one Partner to bind All.—The rule that each partner has authority to bind all the partners, in relation to the firm business, applied to the facts of this case.

Appeal by plaintiff from an order of the district court for Rock county, Perkins, J., presiding, refusing a new trial after verdict for defendant.

Daniel Rohrer, for appellant.

F. E. Brown, for respondent.

MITCHELL, J. It seems to us that a plain case has been obscured by much argument. A statement of the facts in chronological order will present the only point involved. March 7th plaintiff sold to defendant (who was in the saloon business) a bill of goods on 60 days' credit. April 1st defendant took into partnership one Sophy, who assumed half the liability for the debts, and became half owner of the goods in the business; in other words, all existing liabilities incurred by defendant in the saloon business became, as between defendant and Sophy, partnership debts. It does not appear that plaintiff ever knew of this partnership, but that fact is immaterial. On April 16th and April 17th or 18th and on May 17th, respectively, the plaintiff sold to the firm (but in the name of defendant) three other bills of goods, each also on 60 days' credit. On May 14th defendant paid plaintiff \$50 to apply on the bill bought March 7th, and on June 18th gave plaintiff a check for \$100, post-dated July 5th, to apply generally on account, a statement of which was then presented by plaintiff, which included the bill of March 7th. On July 28d plaintiff presented to Sophy, in defendant's absence, an account which contained the last three bills of goods, (but not that of March 7th,) on which was credited the \$150 previously paid by defendant, leaving a balance of \$159, which Sophy paid, and plaintiff receipted the account. At this time Sophy in fact knew nothing about the bill of March 7th, or about the payments made by defendant, but merely paid the balance of the account as presented by plaintiff. All three payments—the two made by defendant as well as that made by Sophy—were made with partnership funds. Plaintiff now sues defendant for the bill of March 7th, and defendant pleads payment by the \$50 paid May 14th, and the \$100 check given June 18th—the same money, it will be observed, for which credit was given and accepted on the three later bills. It would seem that to state the facts is to decide the case. It is immaterial what application of the payments was directed when they were made, or what application the law would make if the parties had made none. If a particular application was directed at the time of payment, it was competent for the parties, by

mutual consent, to change it afterwards; or, if no application was made at the time, it was competent for the parties afterwards to agree on one different from what the law would have made. The bill of March 7th had, as between defendant and Sophy, become a partnership debt as much as the later bills, and all the payments were with firm funds. The plaintiff on July 23d gave and the firm accepted credit for both the \$50 and the \$100 on the three last bills, and it cannot be permitted that a debtor, after acquiescence in an application in extinguishment of one demand, and acceptance of the benefit of it for that purpose, may turn around and attempt to avail himself of the same fund to extinguish another demand for which he may have originally designed it. The facts that defendant was not present when Sophy accepted the credits on the last three bills, and that Sophy did not then know what application defendant had directed when he made the payments, are wholly immaterial. All of these matters were partnership business, as to which each partner was the agent of the other, and the act of one bound both. Without particularizing, it will be seen that the court submitted the case to the jury upon an entirely different theory of the law from that which we have expressed, and for such error a new trial must be granted.

Order reversed.

S. W. OVIATT *vs.* DAKOTA CENTRAL RAILWAY COMPANY.

May 19, 1890.

Railway—Duty to Passengers in Freight or Mixed Trains.—Carriers of passengers are bound to use the best precautions in known practical use to secure the safety of their passengers; and this is the measure of their duty whether they carry them on freight or mixed trains, or on exclusively passenger trains. But this does not require that they should adopt, on freight or mixed trains, all the appliances which they use on passenger trains, but merely the highest degree of care consistent with the practical operation of such trains. *Held*, that there was no evidence in this case that would have justified the jury in finding the defendant

guilty of negligence in not having a bell-rope on a "mixed" train operated as a "way-freight" and "passenger accommodation" combined.

Same—Risks Assumed by Passenger.—When a person takes passage on a freight or mixed train, he assumes all risks necessarily incident to that method of transportation.

Action for personal injuries received in the territory of Dakota. The defendant appeals from an order of the district court for Lyon county, *Webber, J.*, presiding, refusing a new trial after verdict of \$1,500 for plaintiff.

Wilson & Bowers, for appellant.

M. B. Webber, for respondent.

MITCHELL, J. This was an action to recover damages for personal injuries sustained by plaintiff while a passenger on defendant's train. The injury was caused by the breaking in two of the train on a down grade west of De Smet. The engineer, being unaware of the break, ran his engine, with the front part of the train, down to the water-tank, and stopped, when the rear part came down against it, with accelerating speed, causing a severe concussion, which threw the plaintiff from his seat in a passenger coach in the rear, and seriously injured him. Various acts of negligence were charged against the company in the equipment and handling of the train, such as using a defective coupling-pin, not supplying the train with sufficient brakemen, careless management of the train, both before and after it broke; also the failure to have a bell-rope on the train. It was claimed that, if the train had been supplied with a bell-rope, the breaking of the train would have caused the bell to ring once, which the engineer, according to usual code of signals, would have supposed to be a signal from the conductor to stop; and that if this supposed signal had been obeyed, the front part of the train would have been stopped before it had gotten far from the rear part, and the concussion would consequently have been much less severe, and the injury to plaintiff probably avoided. The only question which we find it necessary to consider is whether the trial court erred in refusing to instruct the jury "that on the evidence they could not find the defendant ought to have a bell-rope on the train." It was the undisputed evidence that this was what may be called "the mixed

accommodation train" between Huron and Tracy, which leaves Huron in the evening at 8 o'clock, and consists of an engine and tender, more or less freight-cars, and a baggage-car and passenger coach in the rear. The defendant was accustomed to carry passengers on this train in the coach in the rear. The freight-cars varied according to business; sometimes they amounted to 25. It was run as a "way" freight, cars being taken on or set out at intermediate stations, as occasion required. The particular train on this occasion had only two freight-cars when it started from Huron, but had taken on 13 others at intermediate stations before the accident occurred. The train had no bell-rope. All the evidence bearing upon the propriety, necessity, or practicability of using bell-ropes on such trains was elicited from defendant's witnesses, who were also its employees or ex-employees, and more or less expert in the operation of railways. It is impracticable here to state their evidence *in extenso*, but a full and fair summary of it all is that, while they had known cases where a bell-rope had been used on "through" freight or mixed accommodation trains, (those which do no switching, and neither take in nor set out cars at intermediate stations,) made up of only a limited number of cars, not exceeding 10 or 12, yet they never knew of a rope being used on a "way" freight or mixed train; that the use of a bell-rope on a "way" freight or mixed train, like this between Huron and Tracy, was impracticable, for the following reasons: *First*, every time a car is taken in or set out, or a switch made, at an intermediate station, the rope would have to be divided and carried back, and afterwards coupled on again; *second*, that in windy weather it would blow all over the top of the cars, to the inconvenience and danger of the brakemen; *third*, that with the varying length of the train, as cars were taken in or set out, the rope would have to be lengthened or shortened; *fourth*, that the greater the length of the train the greater the slack in the rope, and the greater the friction by its contact with the cars, foot-board, etc., and hence that it is almost impossible to pull a rope over 10 car-lengths; that about three years before the experiment had been made of putting a rope on this very train, and that it blew all over the top and sometimes down the sides of the cars, and on one occasion caused

the death of a brakeman, after which it was taken off. One witness did say that he had seen on a mixed train a windlass in the forward part of the baggage car to take up and let out the rope, according to the length of the train; but he did not expressly state whether this was a "through" or "way" freight, but it is clearly implied from his other testimony that it was not used on a "way" freight. None of this evidence was rebutted or impeached; and while part of it was the opinions of the witnesses, yet it will be observed that they gave reasons for them, some of which, at least, seem cogent and persuasive.

Carriers of passengers are, of course, bound to use the best precautions in known practical use to secure the safety of their passengers, or, as the rule is sometimes stated, they are held to the highest possible care. This rule applies when they carry passengers on mixed or freight trains, as well as when they carry them on regular passenger trains. But this does not mean that they are required to use every possible preventive of danger which the highest scientific skill might have suggested, nor all the care and diligence which the human mind can conceive, nor such as would render the transportation free from all peril. It would not, for instance, in the present state of railroading, require the use of iron or stone cross-ties, because less liable to decay than wood. Neither does it require that, when they carry passengers on mixed or freight trains, they should adopt all the appliances to insure safety which they use on exclusively passenger trains; for when a passenger takes passage on such trains he assumes all the risks reasonably and necessarily incident to being carried by the method which he voluntarily chooses. What the law does require is everything necessary to the security of passengers, consistent with the business of the carrier and the means of conveyance employed,—the highest degree of care consistent with the practical operation of such trains. While it is easy to thus lay down a general rule as to the measure of the carrier's duty, it is true, as the trial judge remarked, that it is not always easy to determine whether it is a question of law for the court or of fact for the jury to decide whether in a given case the doing or omitting to do a thing is negligence. It is also true that,

when the standard of duty is not fixed, but is variable or depends upon a variety of circumstances, the question of negligence is ordinarily one for the jury; and the fact that all the evidence is on one side does not necessarily warrant the court in taking the question from the jury. It may be of such a character, notwithstanding that it is not directly contradicted, that it would be the province of the jury to weigh it, and draw their own conclusions. But the jury have no right arbitrarily to reject evidence, nor to find a verdict against the entire weight of it. Nor is it true that, in every case where the standard of duty is not definitely fixed, but depends on circumstances, the question of negligence is one for the jury, regardless of the state of the evidence. Our own decisions abound in cases of that kind, where we have held, as a matter of law, that the evidence established, or failed to establish, negligence. It is also to be remembered that the burden of proof is on the plaintiff. If he claims to hold the company liable for failing to provide a bell-rope, it is not enough for him to prove that none was furnished. The law requires of him *prima facie* proof that the omission to do so was negligence. It is not like the case of a broken rail or axle, when the fact of the accident might constitute presumptive evidence of negligence. It is to be further noticed that this matter of failure to provide a bell-rope is in itself a separate, complete, and independent charge of negligence. Consequently a fair test whether the evidence on that point made a case for the jury is, would it have supported a verdict in favor of the plaintiff had this been the only negligence charged against the defendant?

Applying what has been said to the case in hand, we are constrained to the conclusion that there was no evidence which would have justified the jury in finding that defendant was negligent in not having a bell-rope on this train; that if they had so found it would have been not only against the great weight of the evidence, but absolutely without any evidence whatever to sustain it; and therefore the court ought to have granted defendant's request. There is another consideration which we think has much force. The conceded purpose of a bell-rope is to enable the conductor to signal the engineer. The ringing of the bell caused by the train breaking in two would not advise the engi-

neer of that fact. It so happens that, in view of the adopted code of signals, one ring of the bell means to stop; hence the engineer would suppose the one ring caused by the break was a signal from the conductor to stop. It may be that, under the peculiar circumstances of this case, to stop the engine would have the best thing to do, but this was purely accidental. Under other circumstances, the best course might have been for the fore part of the train to run away from the rear part, and that to stop would be the very worst thing to do. So far as appears, where a train like this breaks in two, the false or supposed signal to the engineer would be as likely to aggravate as to mitigate the injurious consequences of the accident. The signalling of the engineer of the breaking of the train being entirely foreign to the object of a bell-rope, we do not see how it can be said that the absence of it was in any sense the proximate cause of plaintiff's injury. But, however this may be, we are of opinion that, for the reasons already given, the court erred in refusing the request. A new trial must be ordered, and this renders it unnecessary to consider the other questions discussed by counsel.

Order reversed.

WILLIAM B. McCLURE vs. MARGARET BRUCK.

May 19, 1890.

Judgment—Correction of Clerical Errors.—A court may, at any time after final judgment, (at least while it remains unexecuted,) correct its own clerical mistakes, so as to make the findings and judgment conform to what it intended they should be. The limitation of one year after notice of judgment in Gen. St. 1878, c. 66, § 125, does not apply to such cases.

Appeal by plaintiff from an order of the district court for Hennepin county, *Young, J.*, presiding, (before whom the case was tried without a jury,) vacating and setting aside the findings of fact, conclusions of law, and judgment, and substituting new findings and conclusions and a new order for judgment.

v.43m.—20

43	305
47	259
43	305
162	500

Wm. B. McIntyre, for appellant.

A. D. Smith, for respondents.

MITCHELL, J. This was an action of ejectment, and was tried by the court without a jury, and upon his findings judgment was entered in favor of the plaintiff, January 10, 1888. It was the intention of the court in ordering judgment for the plaintiff to award him the property described in the complaint, which corresponded with the description in the deeds under which he acquired and claimed title. At the suggestion of the court, plaintiff's attorney drew up findings, which the court signed, supposing that the description therein conformed to the complaint and evidence. But, as a matter of fact, the attorney incorporated in the findings a description which included more land than was described or claimed in the complaint. The judgment, which followed the erroneous description in the findings, has not yet been executed. Upon this showing of facts, in June, 1889, defendant applied to the court to have the findings and judgment corrected so as to make the description of the property conform to that contained in the complaint. Plaintiff's attorney made a counter-affidavit that, before the findings were presented to the court for signature, he submitted them to defendant's attorneys, who approved them, but he does not state that their attention was called to the discrepancy in description between the findings and the complaint. There is nothing to show that defendant personally knew of it until execution was issued to dispossess her. From the order of the court correcting the findings and judgment the plaintiff appeals, his principal contention being that the application was too late; that under Gen. St. 1878, c. 66, § 125, it should have been made within one year after notice of the judgment. The limitation as to time in the statute cited applies only to cases where relief is sought by a party from the consequences of his own mistake, inadvertence, surprise, or excusable neglect, but has no application to a case like the present, where the court is asked to correct its own mistake. Whatever limitations there may be upon the power of a court after final judgment to correct its judicial errors, there is certainly nothing in the way of its correcting its mere clerical mistakes or misprisions, so that the entry may conform to what the court in-

tended it should be. Courts would be very inefficient agencies for the administration of justice, if they had not this power. In this case the court committed no judicial error, but, through the fault of plaintiff's attorney, was led into a clerical mistake, by which a judgment was rendered which the court never intended to pronounce, and which was not within the issues, either as made by the pleadings or litigated on the trial. The court had the undoubted right, at least as long as the judgment was unexecuted, upon its attention being called to the fact, to correct its own records, so as to make the findings and judgment conform to what it intended they should be.

Order affirmed.

FREDERICK S. LEWIS vs. JOHN WILLOUGHBY and others.

May 19, 1890.

Usury—Sufficiency of Evidence.—Evidence *held* sufficient to justify the jury in finding a mortgage usurious.

Same—Receipt of Bonus by Agent.—Where an agent, intrusted with entire management of his principal's business of making, negotiating, and collecting loans, exacts, for the benefit of the principal, a bonus in excess of legal interest, which is included in the amount of the securities, there being no evidence that it was done without the authority or consent of the principal, the act of the agent must be *held*, as a matter of law, to be the act of the principal.

Written Contract—Oral Proof of Fraud or Illegality.—Any matter, such as fraud or illegality, which, if proved, would affect the validity of a written contract, may be proved by oral evidence. The rule against varying or contradicting written instruments by oral evidence is inapplicable to such cases.

Action brought in the district court for Steele county, to recover damages for the taking and conversion of certain horses, cattle, and farm machines. Trial, before *Buckham, J.*, and verdict of \$5,015.80 for plaintiff. The defendants appeal from an order refusing a new trial.

43	307
44	123
44	223
43	307
45	451
43	307
48	72
43	307
58	140
43	307
64	164
43	307
85	245

Carman N. Smith, for appellants.

Wheelock & Sperry, for respondent.

MITCHELL, J. In their answer the defendants justified the taking and conversion complained of under a chattel mortgage executed by plaintiff to defendant Willoughby, and alleged facts authorizing them, under the "insecurity" clause in the mortgage, to take the property before the maturity of the debt secured. The plaintiff replied, denying the existence of any such facts, and alleging that the mortgage was usurious. Aside from the measure of damages or value of the property, the only issues on the trial were, *first*, whether the mortgage was usurious; and, if not, *second*, whether facts existed justifying the mortgagee in taking the property before the maturity of the debt.

The court very properly instructed the jury that, if they found the first in the affirmative, they need go no further, but must find a verdict in favor of plaintiff for the full value of the property; but, if they found both in the negative, they should find in favor of plaintiff only for the excess of the value of the property over and above the amount due on the mortgage; and, if they found the first in the negative and the second in the affirmative, they must find for the defendants. It is evident from the amount of the verdict, viewed in the light of the evidence, that the jury found the mortgage usurious, and hence never reached the second question. We shall first consider the assignments of error affecting the question of usury.

1. One is that the verdict was not justified by the evidence. On the question of usury, the only direct evidence was that of plaintiff and of Bates, the agent of defendant Willoughby, who transacted the business for him. The two flatly contradicted each other. Plaintiff swore positively that the amount of the mortgage, \$7,025, was made up of \$3,500, money loaned; \$3,125, the agreed price of some cattle which Bates compelled him to buy of Willoughby as a condition of getting the loan; and \$400 bonus over and above 10 per cent. interest, which the mortgage drew. Bates, on the other hand, swore with equal positiveness that the agreed price of the cattle was \$3,525, and that no bonus whatever was exacted. So far as we can judge of it on paper, plaintiff's testimony seems the most circumstantial and

consistent. There was very little corroborative circumstantial evidence on either side. Defendants' counsel lays much stress upon a written memorandum of the terms of the bargain executed by plaintiff and Bates before the mortgage was executed, in which the purchase price of the cattle is stated and set down in accordance with Bates's testimony. But, when we consider that, if the transaction was usurious, the most natural thing would be to attempt to conceal it under the guise of a part of the price of the cattle, the recitals incorporated into the writing are not very persuasive evidence. Counsel also relies on some evidence tending to show that the cattle were actually reasonably worth \$3,525. But the evidence as to values was conflicting, and mere estimates or opinions; and the most of what defendants rely on consists of plaintiff's estimates of values when the property was taken, six months after the mortgage was executed. And, while it is true that proof of any great discrepancy between the actual value and the pretended purchase price of property is often the means of unearthing usury cloaked under the form of a sale, yet the actual value of the property has no such conclusive effect as counsel seems to assume. If these parties actually agreed on the price of the stock at \$3,125, and then included \$400 in the mortgage as unlawful interest, the transaction would be none the less usurious because the property was actually worth more than it was sold for. If this was other than a usury case, it would hardly occur to any one but that the evidence was ample to support the verdict. But, while the consequences of an adverse verdict may be more severe than in most other cases, the rule as to the weight of evidence is the same as in any civil action. *Lukens v. Hazlett*, 37 Minn. 441, (35 N. W. Rep. 265.) The jury who saw and heard the witnesses having given credit to the testimony of the plaintiff, and the judge who tried the case having seen no ground for setting aside the verdict, we are certainly not warranted, under the circumstances, in disturbing it.

2. Another assignment of error is the refusal of the court to instruct the jury, according to defendants' eleventh and twelfth requests, to the effect that, in order to charge the defendant Willoughby, plaintiff must have shown not only that his agent, Bates,

made a usurious contract, but that Willoughby authorized him to make it, or knowingly received some benefit from it. Assuming that this is correct as an abstract proposition of law, it was properly refused, for the reason that there was no evidence in the case to which it was applicable. In order to protect, as far as could be done on legal principles, honest and innocent lenders from suffering for the secret, unauthorized exactions of their agents, we have, in substance, held that when an agent merely intrusted with money to lend at legal interest exacts a "bonus" for himself as a condition of making the loan, without the knowledge or authority of the principal, who has neither ratified the act nor derived any benefit from it, the act of the agent would not constitute usury in the principal, or affect the securities in his hands. *Acheson v. Chase*, 28 Minn. 211, (9 N. W. Rep. 734;) *Jordan v. Humphrey*, 31 Minn. 495, (18 N. W. Rep. 450;) *Strait v. Frary*, 33 Minn. 194, (22 N. W. Rep. 295;) *Mackey v. Winkler*, 35 Minn. 513, (29 N. W. Rep. 337.) This is farther than many courts have gone, and as far as we can go without opening a door through which any one can evade the law merely by transacting his business through an agent. See *Avery v. Creigh*, 35 Minn. 456, (29 N. W. Rep. 154.) In the present case, it appears Bates was the general agent of Willoughby, intrusted, apparently, with the entire management of making, negotiating, and collecting loans. The bonus, if one was exacted, was for the benefit of the principal, and included in his securities which he subsequently enforced. Willoughby did not testify on the trial, and there is not a particle of evidence that the bonus was exacted without his knowledge or consent. The presumption in such a case ought to be that what the agent assumed to do for his principal was done by his authority; and, if any facts exist which would relieve him from responsibility for the unlawful exactions of his agent, he ought to prove them. Upon the evidence in this case, the act of Bates must be held, as a matter of law, as the act of Willoughby.

3. The tenth request, to instruct the jury as to the weight to be given to the written contract, was properly refused, for two reasons: *First*, it was inapplicable and misleading in a case where the very subject of inquiry was whether the contract was invalid because of

an illegal consideration entering into it; and, *second*, because it assumed that the evidence in support of and against the hypothesis that the writing correctly stated the real terms and conditions of the agreement was of equal weight and credibility.

4. The objection to oral evidence to show that the sum of \$3,525 was not the actual price for the cattle, but included \$400 bonus, was not well founded. The rule against varying or contradicting a written contract by oral evidence has no application to such a case. Fraud, illegality, or any other matter which, if proved, would affect the validity of a writing, may always be proved by oral evidence.

This covers all assignments of error bearing upon the issue of usury which are entitled to any special consideration. Those relating to the value of the property are entirely without merit. They relate only to the competency of the witnesses Briggs and Sloan, both of whom were shown to have sufficient knowledge of values of such property to justify the court in admitting their testimony. The rules which should govern us in reviewing the action of the trial court in passing upon the competency of a proposed expert witness are stated in *Stevens v. City of Minneapolis*, 42 Minn. 186, (43 N. W. Rep. 842.)

We have not discussed the assignments of error affecting merely the issue as to whether, if the mortgage had been valid, the defendant would have been justified in taking it before the maturity of the debt, because we deem them immaterial, the jury never having reached that question. We may remark, however, that we have examined them, and find no error in any of the rulings of the court complained of.

Order affirmed.

NOTE. A motion for reargument of this case was denied June 10, 1890.

HERMAN MOEDE vs. COUNTY OF STEARNS.

May 19, 1890.

Certiorari—Appeal from Final Order.—In proceedings on *certiorari* an appeal will lie from a final order of the district court affecting a substantial right.

School-District—Reversal of Order of County Board—Appeal.—The board of county commissioners, as the representative of the public, to whom is intrusted the matter of forming school-districts, may appeal from an order of the district court reversing their action in establishing a new district.

Same—Certiorari.—The action of the county board in forming school-districts is legislative, and not judicial, and cannot be reviewed on *certiorari*, (following former decisions.)

Appeal by defendant from a judgment of the district court for Stearns county, *Searle, J.*, presiding.

Oscar Taylor, for appellant.

Reynolds & Stewart, for respondent.

MITCHELL, J. Upon *certiorari*, the district court reviewed and quashed the proceedings of the board of county commissioners in forming a new school-district, and from this action of the court the board appeals. The respondent moves to dismiss the appeal on the grounds—*first*, that in *certiorari* an appeal does not lie from the district to the supreme court; and, *second*, that, in any event, the board of commissioners have no such right. The first ground is not urged in the brief, and is clearly not well taken; for if *certiorari* be not a "civil action," within the meaning of the statute, it certainly is a special judicial proceeding, from a final order in which, affecting a substantial right, an appeal will lie. In support of the second ground, counsel urges that the county board is not a party to the *certiorari*, the writ being merely directed to them to bring up their proceedings for review; that the board is not a party aggrieved, having no interest in the subject involved,—likening the case to one where the judgment of a court is reviewed on *certiorari*, in which it is uniformly held that the court or judge whose judicial action is re-

viewed and reversed is not interested in the result, and hence cannot appeal, not being a party aggrieved. But, in our judgment, the cases are not at all analogous. The court or judge in the case supposed has no representative capacity, but is merely the tribunal by whom the rights of others have been determined. But the board of county commissioners is the representative of the county or public, to which is intrusted the matter of forming new school-districts, and uniting, dividing, or changing the boundaries of old ones, as public interests require. The public has a special interest in the establishment and preservation of these districts, and we think that the board of county commissioners, to whom that matter is intrusted, is, as the representative of the public in that regard, a party interested in and aggrieved by the order of the court reversing and setting aside their action, and therefore has the right of appeal.

The order appealed from must be reversed, unless we are to overrule former decisions in which we have held that the action of a board of county commissioners of this nature is merely legislative, and not judicial or quasi judicial, and cannot be reviewed on *certiorari*. *In re Wilson*, 32 Minn. 145, (19 N. W. Rep. 723;) *State v. Mayor of St. Paul*, 34 Minn. 250, (25 N. W. Rep. 449;) *Lemont v. County of Dodge*, 39 Minn. 385, (40 N. W. Rep. 359;) *Christlieb v. County of Hennepin*, 41 Minn. 142, (42 N. W. Rep. 930.) We are aware that there is abundant authority to be found elsewhere for reviewing proceedings like these on a writ of *certiorari*; some courts going so far as to hold that any proceedings, whether judicial, legislative, or executive, of any inferior court, tribunal, board, or officer, may be reviewed in this way, if there is no appeal or other direct mode of reviewing their proceedings. But while we have to recognize the fact that the office of this writ has been extended beyond what it was at common law, and is not now confined to reviewing the decisions of courts, properly so called, but may also be used in certain cases to review the proceedings of special tribunals, boards, commissions, and officers of municipal corporations, yet reflection and further examination only confirm us in the opinion that, both on principle and considerations of public policy, we are right in confining the office of the writ, in the latter class of cases, to acts that are

strictly judicial, or *quasi* judicial, in their nature. There is no country in which the distinction between the functions of the three departments of government is more definitely marked out on paper than in the United States, and yet there is none in which the courts have assumed so often to review, in advance of actual litigation involving the question, the acts of co-ordinate branches of the government. It has become the fashion to invoke the courts by direct action, or through some remedial writ, to review almost every conceivable act, legislative, executive, or ministerial, of other departments; and courts have been so often inclined to amplify their jurisdiction in that respect that they have not unfrequently converted themselves into a sort of appellate and supervisory legislative or executive body. Such a practice is calculated to interfere with the proper exercise of the functions of executive and legislative officers or bodies; to obliterate the distinction between the powers and duties of the different departments of government; and, above all, to bring the courts themselves into disrepute, and destroy popular respect for their decisions. It may be very convenient to have in advance a judicial determination upon the validity of a legislative or executive act. It would often be equally so in the case of acts of a legislature. But we think the courts will best subserve the purposes for which they are organized by confining themselves strictly to their own proper sphere of action, and not assuming to pass upon the purely legislative or executive acts of other officers or bodies until the question properly arises in actual litigation between parties. It is but fair to the learned district judge to state that this question does not appear to have been raised or called to his attention on the trial in the court below.

Judgment reversed.

C. D. HAYEN and others vs. W. E. NEAL and another.

May 26, 1890.

43	815
47	496
43	815
51	96
43	815
88	291
88	292

Action for Deceit—Fraudulent Intent, how Shown.—In order to sustain an action for deceit, the fraudulent intent must be established, but it may be inferred from the fact that material false statements are made, with knowledge of their falsity; and where a party who is in a position to know the truth deliberately makes unqualified representations in reference to a material matter which are not true, a similar intent may be inferred; but the question of fraudulent intent is usually for the jury.

Same—Sale—Fraud of Seller—Remedies of Buyer.—In the case of a fraudulent sale of goods, the vendee may retain the same, and sue for damages suffered on account of the fraud; and the receipt of some of the goods, and the completion of the contract subsequent to the discovery of the fraud, will not necessarily constitute a waiver of his claim, or defeat his action for damages.

Same—Representations of Value.—Representations as to the value of property are ordinarily treated as matter of opinion; but they may properly be received in evidence when they are connected with, and serve to characterize, other material statements.

Same—Evidence.—Evidence considered, and *held* to make a case for the jury.

Action brought in the district court for Hennepin county, to recover \$2,700 damages for alleged fraud in the sale of logs. Trial before Young, J., who ordered a dismissal at the close of plaintiffs' case. The plaintiffs appeal from an order refusing a new trial.

Gilger & Harrison, for appellants.

Hale & Peck, for respondents.

VANDEBURGH, J.¹ 1. This action is brought to recover damages for alleged false and fraudulent representations, by means of which plaintiffs were induced to enter into a written contract for the purchase of a quantity of logs, at the price of \$6 per 1,000, in the spring of 1886. It is alleged in the complaint that, for the purpose of inducing the plaintiffs and the firm of Cole & Weeks, who were jointly

¹ Mitchell, J., took no part in this case.

interested with plaintiffs in the venture, to enter into the contract, the defendants did falsely and fraudulently state and represent to them that all of the logs so contracted to be sold were good, sound, and smooth logs; that there was included among them a lot of 300,000 feet of large logs, of such size and quality that they were reasonably worth in the boom at Minneapolis \$9 per 1,000 feet; that plaintiffs were ignorant of the character and quality of the logs, and were unable to inspect them because they were intermingled with other logs in the river, but that the defendants knew their size, quality, and condition; that the plaintiffs believed these representations, and relied upon them, and were thereby led to make the contract; but that in truth and in fact there were 300,000 feet of the logs included in the contract that proved to be unsound and worthless.

After the plaintiffs had introduced their evidence upon the trial, the court, on the defendants' motion, dismissed the action on the ground that plaintiffs had not shown either actionable fraud or damage. But we think there was evidence in the case sufficient to warrant its submission to the jury. In order to sustain an action for deceit, the fraudulent intent must be established; but it may be inferred from the fact that the false statements are made with knowledge of their falsity. And where a party who may be presumed to know, or who is in a position to know, the truth, deliberately makes unqualified representations in respect to a material matter, in such manner as to import a knowledge by him of their truth, for the purpose of inducing another to act upon them, a similar inference may arise; and, in such case, if a party has acted in reliance on such representations, he is entitled to maintain an action for the injury sustained thereby. But the question of fraudulent intent is usually one for the jury. *Meyer v. Amidon*, 23 Hun, 553; 2 Pom. Eq. Jur. § 884; *Hazard v. Irwin*, 18 Pick. 95; *Page v. Bent*, 2 Met. 371; 3 Wait, Act. & Def. 436; *Salisbury v. Howe*, 87 N. Y. 128; *Cowley v. Smyth*, 46 N. J. Law, 380; *Humphrey v. Merriam*, 32 Minn. 197, (20 N. W. Rep. 138.)

In this case there is no direct evidence that the defendant Neal, who made the representations, knew of their falsity; but he was one of the owners of the logs, and assumed to describe the logs as one

acquainted with their character and condition, and stated that they were in the river where plaintiffs could not see them. Plaintiffs had no knowledge of the logs, except his representations, which they relied on in making the purchase. Without attempting to refer to the evidence in full, it appears from the testimony, among other things, that "Neal represented that the logs were all nice, smooth logs, and there were 300,000 feet or more of them that were very nice logs at Pokegama Lake, and were sound and fine and smooth, well worth \$9 per thousand. He said the logs were all sound and smooth." The witness states further: "I found no one who knew about the scaling of these logs but Mr. Neal and Mr. Eustis. I tried to find some one else to get their opinion, but could not; but I had to rely upon Neal entirely." Another witness states: "Neal said that the logs were of sound timber, green, merchantable lumber, and a portion of them, being cut in the vicinity of Pokegama Lake, were very much larger than the rest; that there were 300,000 feet that were very large logs, running from four to five to the thousand." "They were represented to us to be green, sound timber. I had no knowledge, only what Neal told us. I fully relied upon these representations." The witness further stated: "As soon as we began to saw them, we found that some of the logs were old, dry, rotten logs. The good and poor logs were all intermingled. There was no way we could ascertain before we sawed the logs what proportion was good and what bad. There were 300,000 feet or more of these logs that were unsound. I was present at the mill all the time each day that these logs were being sawed. These 300,000 feet or more which I have spoken of were old, dry logs, cut from windfalls,—dead timber." There is also other evidence tending to show that 300,000 feet of the logs delivered under the contract were worthless, and that they were the large logs included therein. Upon the question of fraud or deceit in the sale, there was a *prima facie* case made. That is to say, it was a fair question for the jury to find whether or not the representations were false, and made as of defendants' own knowledge.

2. It is contended that the plaintiffs waived their claim for damages for the alleged fraud by receiving the logs and subsequently making payments upon the contract. But they did not attempt to rescind,

and were not obliged to rescind, the contract. They had made a large payment in advance. The other payment was to be made in instalments, and the amount of the damages could not be ascertained till all the logs were sawed, and the greater part were not complained of, but the good and bad were intermingled; and the evidence tends to show that the payments were made under protest, after suit, and upon a promise and agreement by the defendants that they would make good the loss if the logs were not as represented. We think there was no waiver or intention to waive their claim for damages, if they were not ascertained and allowed as agreed by the defendants. And no point is made that the actions brought by defendants for the purchase price, and the recovery therein, constituted an estoppel in this case.

3. We think the court erred in holding, upon the dismissal, that the evidence tending to show that a large quantity of the logs were unsound was immaterial, on the ground that it did not appear that such logs were not logs rejected by the surveyor general in the boom scale, and hence were presumably not included in the lot of logs scaled to plaintiffs, and paid for by them. Under the pleadings the controversy was over logs sold and actually delivered under the contract; and the case was clearly tried upon that understanding by both parties. The point could hardly be fairly raised at that stage of the case.

4. We may add, in respect to some rulings in the course of the trial, that while, as a rule, representations as to the value of property are to be deemed matter of opinion, and not of fact, yet, when such representations are made in connection with others, which are material as tending to establish the plaintiff's case, they should not be ruled out, but the entire statement should be received and considered together. *Hickey v. Morrell*, 102 N. Y. 454, 463, (7 N. E. Rep. 321.) And in this case the alleged representations of the defendants that the 300,000 feet of large logs were worth \$9 per 1,000, which was relatively much more than the balance were worth or were claimed to be, was proper to be received as part of the representations which may have tended to influence the buyers under the circumstances of this case. *Simar v. Canaday*, 58 N. Y. 298, 306; *Bacon v. Frisbie*, 15 Hun, 26; *Nowlin v. Snow*, 40 Mich. 699. And so, also, evidence

that the poor and unsound logs were the large ones, and of the actual value of such logs as it proved to be, was proper to be received on the question of damages.

These are all the questions which are important to be considered, and the result is that the order denying a new trial should be reversed.

NELLIE C. DALY vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

43 319
45 488

May 26, 1890.

Railway—Fire set by Locomotive—Presumption of Negligence, how Rebutted.—Where a fire is kindled upon lands adjoining a railway track by sparks from a locomotive engine, the presumption of negligence arises from that fact without further proof. But this presumption may be met and overcome by satisfactory proof that the engine was properly constructed and managed, and in suitable repair; and, if the uncontradicted evidence on the part of the railway company clearly shows that it has fully performed its duty in these respects, the presumption of negligence is rebutted, and evidence of negligence other than the bare fact that the fire was set by the engine will be necessary in order to warrant a verdict for plaintiff in an action for damages caused by such fire.

Appeal by defendant from an order of the district court for Big Stone county, *C. L. Brown, J.*, presiding, refusing a new trial after verdict of \$275 for plaintiff.

W. H. Norris and *F. W. Root*, for appellant.

A. S. Crossfield and *P. J. Daly*, for respondent.

VANDEBURGH, J.¹ A locomotive with train of cars, passing over defendant's road near plaintiff's premises, set fire, as plaintiff alleges, to dry grass or combustible material near the track, which spread to plaintiff's land, and destroyed certain trees, for the value of which this action is brought. The negligence alleged is faulty and defective construction of the engine, and the failure to provide it with modern

¹Mitchell, J., took no part in this case.

appliances necessary to prevent sparks and fire escaping, and also negligent management. Upon the trial the testimony of the witness called by the plaintiff to prove that the engine set fire to the grass shows that he observed it from the train: "Saw a spark come down with the smoke, and set fire to the grass. The wind was blowing heavy at the time from the northwest, in the direction from where this took place, towards the trees." On his cross-examination he testified: "There was a good deal of smoke where the fire was set. I had noticed sparks coming from the engine at other points." "Those little sparks that I could detect in the smoke, I could see about eight feet from the ground." "When I saw them, I could see them shine. They looked like little, fine sparks. This particular spark, I could see, was alive at a point about eight feet from the ground. When it was two feet from the ground, it kept getting darker. The nearer the ground they got, the darker they got. I did not say that this spark was a live spark shining with fire. I said it was a dull spark. I want this jury to understand that there was fire coming from that engine that set fire to the grass." This is all the evidence there is in relation to the cause of the fire, and the manner in which it was kindled. It is sufficient to show that it was caused by the engine, and to raise the statutory presumption of negligence on the part of the defendant, either in respect to the management of the engine, its construction, or state of repair.

The jury found specially that the engine "was not out of repair," and that it was "not improperly, unskillfully, or negligently managed at the time the fire so escaped," but that "it escaped because of the defective construction of defendant's locomotive." The sole question for our consideration is whether the last-named finding is justified by the evidence, or, rather, whether, upon the undisputed evidence in the case, it is clearly erroneous. The testimony of the engineer in charge of the engine is that he had been an engineer for six years, and had eleven years' experience on and about engines, and that the engine in question "had all the appliances tested at that time, to my knowledge, for preventing fire from escaping from the stack. I did not notice on that trip that this engine was throwing off any unusual amount of sparks." "From my experience as an engineer, with an

engine properly constructed, in good condition, carefully and skilfully managed and operated, it is not possible to entirely prevent the escape of sparks from the smoke-stack." "The fuel used on this trip was soft coal. That is the usual fuel used by railroad companies in this part of the country." On the cross-examination he testified: "I have stated that the engine was in perfect condition; that it had all the appliances that are necessary to make an engine perfect, in use at that time. There were other appliances being tested. I have noticed that the Northwest took the lead in that respect. In my experience as an engineer, I have never seen an engine with any appliance on but what more or less sparks would escape. There may be such appliances, but I have never seen them. I do not think there is one at this time. If there was any, I did not have any on that engine. The appliances on that engine to prevent the free emission of sparks and fire that were necessary to be put into an engine were: In the first place, in the stack there was a cone with the point projecting down. When the sparks come up, they strike that. Above that there is a netting to stop them coming out. I could not say how large the holes through that netting are. The netting on that engine that I was running at that time was standard. The holes in that netting were not but a little over one-eighth of an inch square. The netting was made of steel wire. I do not know the exact size of the steel wire." Rupert, an engineer of 20 years' experience, in charge of the round-house and shops at Fargo, testified that Sullivan, the engineer in charge of the engine in question, had been running an engine under him for three years, and that his qualifications were first class; that he himself had known the engine for three years, and was in the habit of seeing it almost every day, and was acquainted with its general construction; that it was well constructed, and in good condition; and that it was impossible to entirely prevent the escape of sparks from an engine. There is no evidence in the case tending in any degree to rebut, qualify, or limit the effect of this testimony. The evidence of plaintiff is entirely consistent with it; for it does not appear that the sparks which escaped were not so small or fine as to pass through the standard netting, or to escape, notwithstanding the most approved appliances known or practicable were used; and the

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sparks thrown in this case were "fine sparks." It is difficult to see how the emission of sparks with hot ashes and smoke could be entirely or absolutely prevented, especially in the presence of strong winds. In any event, the undisputed evidence in this case is to the contrary. The *onus* rested upon the defendant to show that it was not guilty of negligence in the premises; but the presumption arising from the fire is a disputable one, and may be rebutted by showing that the defendant has used due care and diligence, in the construction of its engine, to avoid the danger, and prevent fire escaping from its engines. And it is difficult to see why, as respects the particular finding under consideration, the evidence introduced by the defendant in this case is not as broad as the presumption, or why it does not satisfactorily rebut any legal inference of faulty or negligent construction of the engine. 2 Shear. & R. Neg. § 676; *Karsen v. Milwaukee & St. Paul Ry. Co.*, 29 Minn. 12, (11 N. W. Rep. 122;) *Searles v. Manhattan Ry. Co.*, 101 N. Y. 661, (5 N. E. Rep. 65;) *Reading & Columbia R. Co. v. Latshaw*, 93 Pa. St. 449. There are no facts or circumstances shown upon which to raise any question as to the credibility of the witnesses; and, as this particular finding of the jury must be considered to be unsupported, and to have influenced the general verdict in the case, there must be a new trial.

Order reversed.

STATE OF MINNESOTA, *ex rel.* Frank Nicolin, *vs.* BOARD OF COUNTY COMMISSIONERS OF SCOTT COUNTY.

May 26, 1890.

Change of County-Seats—Publication of Notice.—Under Laws 1889, c. 174, relating to the removal of county-seats, the notice of the meeting of the county commissioners to act upon the petition of legal voters for a change of a county-seat must be published and posted as therein required, in order to give the commissioners jurisdiction to proceed.

Same—Publication held Insufficient.—Notice of a meeting to be held on the 27th day of May, published on the 15th and 22d days of May, respectively, is not a sufficient publication under the statute.

Same—Duty of County Board when Notice is Sufficient.—The determination of the question of the sufficiency of the notice is not an act involving the exercise of judicial discretion; and where the proceedings are regular, and the notice and proof of publication and posting is sufficient, which may be determined by inspection of the record, it is the duty of the commissioners to proceed and act upon the petition.

Appeal by the relator from an order of the district court for Scott county, *Edson, J.*, presiding, quashing an alternative writ of *mandamus*.

C. D. & Thos. D. O'Brien and *F. J. Leonard*, for relator.

James McHale, H. J. Peck, and Henry Hinds, for respondent.

VANDERBURGH, J. Upon the former appeal in this case from the order allowing a peremptory writ of *mandamus* against the defendants, county commissioners, directing them to act upon the petition of the relator and others for a change of the county-seat of Scott county, under the provisions of Laws 1889, c. 174, it was determined that the notice required by that act to be given was a condition precedent to action by the board upon the petition. *State v. Com'rs of Scott Co.*, 42 Minn. 284, (44 N. W. Rep. 65.) This is an appeal from an order of the district court quashing and dismissing the subsequent writ of alternative *mandamus* allowed by the district court in the same matter, upon the motion of the respondents. The principal grounds of such motion were that it did not appear by the record that the notice of the meeting of the board was published for the time or in the manner required by the act referred to; and that in so determining the action of the board was judicial, and not subject to be reviewed by *mandamus*. We think the action of the court below should be sustained on the first ground. The statute requires that the notice shall be published once in each week for *two* consecutive weeks, immediately *preceding* the time fixed therein for the special meeting, in all the newspapers printed and published in such county during such period, and that there should be posted a duplicate thereof in a public place in each organized town in the county, not less than 10 days prior to the time fixed in such notice for the meeting. The special objection to the publication of the notice in this case is that the record conclusively shows that the notice was

published in each paper less than two weeks immediately preceding the meeting. The meeting was appointed May 27, 1889, while in none of the five newspapers in which the notice was published was the notice inserted prior to May 15th, and the second publication was on the 22d day of May, and in some cases as late as the 24th day of May. This was not a publication of two weeks' notice, as required by the statute. *Wilson v. Thompson*, 26 Minn. 299, (3 N. W. Rep. 699.) This objection is insuperable, and the commissioners were right in refusing to proceed under the notice. The proof of the posting of the notice in the several towns was also defective, in failing to show that the same was posted in a public place. The court might take notice that the post-office, court-house, and township bulletin-boards were public places, but not so as to the other places mentioned in the affidavit. If, however, the proof in this respect was not according to the fact, an amended or new affidavit might have been made.

With reference to further proceedings, it is proper to say that the court is of the opinion that the action of the board on the question of the sufficiency of the notice is not judicial, and does not involve the exercise of judicial discretion. The matter was to be determined upon inspection of the proof of publication, and if the proper notice was in fact given, and the proper proof thereof made, it would be the duty of the board to proceed, and take action upon the petition.

Order affirmed.

STATE OF MINNESOTA *vs.* GERHARD H. THADEN.

May 26, 1890.

Joint Indictment—Separate Trials—Waiver of Formal Order.—Upon a joint indictment against several defendants, the court may direct the trial to proceed against one on the application of the state; and where the case against one was separately moved for trial, and a jury was sworn without objection by the defendant, *held*, that the failure to enter a formal order for a separate trial was not prejudicial error or ground for new trial.

False Pretences including Promise—Evidence.—Where a promise is connected with false pretences, and co-operates with them to influence the party deceived thereby, the promise may be alleged and shown as a part of the charge, if the pretence of past or existing facts is sufficient.

Codefendant as Witness for State.—Prior to the amendment of 1868 to Gen. St. 1866, c. 73, § 7, one defendant was not competent to become a witness for or against his codefendant until convicted, acquitted, or discharged. The amendment established a new rule, and, on a trial of one defendant under a joint indictment against two, his codefendant may offer himself as a witness, and give testimony in behalf of the state against the defendant on trial.

Appeal by defendant from an order of the district court for Ramsey county, *Wilkin, J.*, presiding, refusing a new trial.

Johns, Michael & Johns, for appellant.

M. E. Clapp, Attorney General, *M. D. Munn*, and *N. M. Thygeson*, for the State.

VANDEBURGH, J. The defendant was indicted jointly with Draper and Kingsley. The defendant Draper had not been arrested or found at the time of the trial, and the defendant Kingsley had given notice that he desired a separate trial, and appeared by a separate attorney.

1. We think the court did not lose its right and authority to proceed with the separate trial of defendant Thaden because no formal order therefor was made and entered when or before the case was called. The prosecution moved the case of "The State against Thaden," and it was so understood by both parties, and the defendant made no objection till the jury was sworn, and we must presume

that they were sworn in the case against him, and not against all the defendants. *Babcock v. People*, 15 Hun, 347, 353. By the common law, the court might grant or refuse separate trials in its discretion. This is so far modified by our statute (Gen. St. 1878, c. 114, § 6) that the defendant is entitled to it as a matter of right if he require it, but the court may also so direct, on the application of the state.

2. The substance of the false pretences by means of which the defendant is alleged to have fraudulently procured the property of the complaining witness, described in the indictment, is that Kingsley, one of the defendants, desired to purchase the property, and owned the note for \$500, therein also described, which was stated to be secured by mortgage on a lot in South Duluth, so called; that the lot was worth \$1,000, and that the note was worth its face value, \$500; and that they promised that they would procure a purchaser of the note and mortgage of the complaining witness if he would deliver to them the property in question,—all of which representations were relied on and believed by him, and upon the strength thereof he delivered the same to them; that the defendants knew the representations so made were false, etc.; that the note was entirely worthless, and that the lot and mortgage security were worthless, and of no value whatever. These representations were not mere expressions of opinion. The mortgaged premises were positively represented to be of great value, and double the amount of the note, and the note to be a valuable security, worth its face value, when known to be worthless; and these representations were coupled with a promise to find a purchaser, which doubtless aided the consummation of the fraud, as it was well calculated to do. Where a promise is thus connected with false pretences, and co-operates with them in the inducement, the case is within the statute if the pretence of false existing or past facts is sufficient. The promise and the pretence may be so connected that it would be difficult to prove one without the other, and equally necessary to an intelligent statement of the facts that both be included in the indictment. *Com. v. Wallace*, 114 Pa. St. 405, (6 Atl. Rep. 685.) The indictment is deemed sufficient.

3. In the course of the trial the defendant Kingsley was offered as a witness, and was permitted to testify in the case against the objec-

tion of the defendant Thaden. This is also assigned as error. The common-law authorities differ upon the question whether, upon the separate trial of one defendant in a criminal case, his codefendant, before trial or discharge, may become a witness in the case for the prosecution. But the doctrine that he may is well supported. Whart. Crim. Ev. (9th Ed.) § 439; Hawk. P. C., b. 2, c. 46, § 90; *Noyes v. State*, 41 N. J. Law, 418, 429; 1 Greenl. Ev. § 379; *State v. Barrows*, 76 Me. 401, 407, and cases cited; and see *Wixson v. People*, 5 Parker, Crim. R. 119. But in this state, prior to the amendment of 1868 (Laws 1868, c. 70) of section 7, c. 73, Gen. St. 1866, the law was otherwise, and one defendant was not competent to be a witness for or against a codefendant until convicted, acquitted, or discharged. But under the amended statute a defendant in a criminal case, at his own request, becomes a competent witness. The amended section establishes a new rule, and necessarily repealed so much of the former section as it superseded, and also section 8, c. 114, Gen. St. Being made a competent witness, a defendant may offer himself as a witness against as well as for a codefendant on trial; in other words, he may be a witness in behalf of the state. And section 7, as well as section 8, c. 114, Gen. St., became inoperative by the amendment referred to. Under a similar statute in Massachusetts, it is held that, on a joint trial of two defendants, one may offer himself as a witness against his codefendant. *Com. v. Brown*, 130 Mass. 279. And in *State v. Barrows*, 76 Me. 401, 410, on a separate trial of one defendant on a joint indictment against two for murder, it was held, in a well-considered opinion, that his codefendant might, with his own consent, be called and allowed to testify against the defendant on trial. It can hardly be questioned that upon a joint trial either defendant would be a competent witness at his own option; and it would be singular if a different and more stringent rule should prevail in case of separate trials. We think no such distinction is contemplated by the statute. The court did not err in receiving the testimony of the witness.

We discover no ground for reversal, and the order denying a new trial is accordingly affirmed.

STATE OF MINNESOTA, *ex rel.* LEON E. LUM, *vs.* DAVID ARCHIBALD.

May 28, 1890.

Statute—Repeal by Implication.—To justify a court in holding that an act of the legislature is repealed by one subsequently passed, it must appear that the later enactment is certainly and clearly in hostility to the earlier. If by any reasonable construction the two statutes can stand together, they must so stand. It is only in the event that harmony is impossible that the earlier enactment is repealed.

Same—Special Act not Repealed by General Law.—From the terms of Laws 1887, c. 118, which detached from the unorganized county of Cass a part of its territory, and attached it to the organized county of Crow Wing, (if the electors of the last-mentioned county should approve the measure by ballot,) it is manifest that the legislative mind was particularly and specially called to the subject therein disposed of. *Held*, that said chapter 118 was not repealed by the passage, subsequently, of an act which was of general application to the unorganized counties of the state, viz., Laws 1887, c. 119.

Mandamus.—It is a fundamental principle of the law of *mandamus* that the writ will never be granted in cases when, if issued, it would prove unavailing.

Appeal by the respondent below from an order of the district court for Crow Wing county, *Holland, J.*, presiding, directing the issuance of a peremptory writ of *mandamus*.

G. S. Fernald and Flannery & Cooke, for appellant.

Gordon E. Cole and Leon E. Lum, for respondent (relator.)

COLLINS, J. This is an appeal from an order directing that a peremptory writ of *mandamus* issue, addressed to the defendant, an assessor, requiring and compelling him, as such, to proceed with the assessment of real and personal property in certain territory alleged to be a part of Crow Wing county. The controversy arises by reason of the passage of an act entitled "An act relating to the change of county lines of unorganized counties, and annexation of unorganized territory to organized counties," which was approved on February

25, 1887, now known as chapter 119, Gen. Laws of that year; and the passage of another act, approved on February 18th of the same year, entitled "An act to detach certain territory from the unorganized county of Cass, and attach the same to Crow Wing county." It is now found as chapter 118, Laws 1887. The appellant contends that the act last mentioned (chapter 118) was repealed upon the passage and approval of the other act, (chapter 119,) and this we regard as the only question needing special consideration. By the several sections of chapter 118, a certain portion of the unorganized county of Cass was detached therefrom, and, subject to the approval of the legal voters of the organized county of Crow Wing, attached to the latter. The proposition was to be submitted to the electors of the organized county at the next general election, and, if approved by a majority of those voting thereon, the governor of the state was required to make proclamation of the fact. There was also another provision of the act in reference to taxes previously levied on property affected by the change, remaining uncollected at the time of its approval by the legal voters.

There are three sections in the law approved February 25th: The first, that no change shall be made in the lines of an unorganized county, and no part thereof shall be annexed to an organized county, "without first submitting the proposition for such change of line or annexation to the electors of the county or counties to be affected thereby," and an adoption of the proposition by a majority of the electors of each county voting thereon; the second, "that all acts or parts of acts inconsistent with this act are hereby repealed;" and the third, (as was also provided in chapter 118,) that the same should take effect from and after its passage. In accordance with the provisions of chapter 118, the question of annexing the territory therein described to Crow Wing county was duly submitted to the legal voters thereof at a general election held in November, 1888, at which time a majority voted in favor of annexation. The electors of Cass county did not vote upon the proposition. The result in Crow Wing was proclaimed by the governor prior to April 2, 1889, and on that day defendant was duly appointed assessor for a portion of Crow Wing county, including, if chapter 118 was unrepealed, the

territory in dispute. Thereafter defendant refused to proceed with the assessment of personal property within this territory, solely on the ground heretofore indicated, that the earlier act (chapter 118) was repealed by implication on the passage of the later, (chapter 119.)

1. Starting out with the proposition, which has become axiomatic, that repeals by implication are not favored, we may safely say, as a reasonable proposition, that a legislature does not intend to effect so important a measure as the repeal of a law, without expressing its intent so to do. Such an interpretation, therefore, should not be adopted unless it be inevitable, and any reasonable construction of the later act which offers an escape from it is more likely to be in consonance with the real intention. It is a rule well founded in reason, as well as in authority, that to give an act not clearly intended as a substitute for another the effect of repealing it, the implication of an intent to repeal must be disclosed by a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict, or liberal construction thereof, which would, without destroying its manifest intent and meaning, find for it a reasonable field of operation, preserving at the same time the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject. To justify a court in holding that an act is repealed by one subsequently passed, it must appear that the later provision is certainly and clearly in hostility to the former. If by any reasonable construction the two statutes can stand together, they must so stand. If harmony is impossible, and it is only in that event, the earlier enactment is repealed. *Wood v. U. S.*, 16 Pet. 342; *State v. Stoll*, 17 Wall. 425; *Chew Heong v. U. S.*, 112 U. S. 536, (5 Sup. Ct. Rep. 255;) *People v. Board Suprs. St. Lawrence Co.*, 103 N. Y. 541, (9 N. E. Rep. 311;) *Rounds v. Waymart Borough*, 81 Pa. St. 395; *Covington v. City of East St. Louis*, 78 Ill. 548; *Iverson v. State*, 52 Ala. 170; *Pratt v. Atlantic & St. Lawrence R. Co.*, 42 Me. 579; Sedg. St. & Const. Law, 105; Smith, St. Law, 879. Of course, repeal by implication can be effected by inconsistent enactments at the same session of the legislature; but it has been said that statutes enacted at the same session are to be

construed to a certain extent as one act, and therefore in such a case there is a much stronger presumption against an intention to repeal which is not expressed than in case of statutes passed at different sessions; and in such cases there should be such an exposition as will give effect to what appears to be the main intent of the law-maker. *Peyton v. Moseley*, 3 T. B. Mon. 77; *Eckloff v. District of Columbia*, 4 Mackey, 572; *Board of Commrs. of La Grange Co. v. Cutler*, 6 Ind. 354.

In the cases first above referred to, and in the large number of authorities therein cited, may be found instances in which the general rules in respect to repeal by implication have been applied, and it only remains for us to make a like application to the facts in hand. As section 1, art. 11, of the constitution bears upon changes in the lines of organized counties only, the law-makers were not restricted in any manner when dealing with the county of Cass. But, as chapter 118 affected the boundary lines of the organized county of Crow Wing, the measure had to be formally approved by the electors of that county before the alteration declared by the legislature became a certainty, and this approval was provided for in the act. Without this enactment, the voters of Crow Wing county were helpless. Its passage, whereby the boundary lines of both counties were changed in so far as that could be accomplished by legislation, was quite as essential to the transfer of a portion of the unorganized county to the organized as was the step subsequently to be taken by the legal voters. And when the law-makers considered and determined upon the subject of this change in county lines, fully and finally covering all matters within the scope of legislative authority, we are unable to see why this action was not as complete and of as great force as if neither of these counties had been organized, and the sections providing for a ballot had been omitted. If such had been the case, no one would have contended that there had been a repeal by implication. When enacting chapter 118, the legislative mind was particularly called to Cass county, and that part of its territory which was to be attached to another county, if the electors of the last-mentioned county so willed it by their ballots. The intent in reference to this particular subject was specially manifested and announced, while

chapter 119 was general in its application to the unorganized counties of the state. See Dill. Mun. Corp. § 87. Therefore, and without considering the fact that these laws were passed about the same time and at the same session of the legislature, we conclude that both acts may stand, and that the later general law is not in hostility to, and may readily be harmonized with, the earlier, which is special and local.

2. The suggestion of appellant that the relator has not such a beneficial interest in the subject-matter of this controversy as entitled him to file the information upon which this proceeding is based, is disposed of by *State v. Weld*, 39 Minn. 426, (40 N. W. Rep. 561.)

3. We have heretofore stated that this appeal is from an order directing the issuance of a peremptory writ of *mandamus*, requiring and directing defendant, as an assessor, to perform his duties by assessing the personal property within the district in dispute. The proceeding which led to the order appealed from was initiated in the month of June, but the order itself was not made by the court until August 31, 1889. The appellant insists that this was too late, and for that reason there must be a reversal of the order. Under the statute, (Gen. St. 1878, c. 11, § 33,) as amended, (Laws 1881, c. 10, § 6,) the defendant assessor should have made his assessment in the months of May and June. By section 34, c. 11, *supra*, property can be assessed later, and up to such time as the officer makes return of his books. The town board of review meets on the fourth Monday in June, (section 39 of said chapter,) and evidently it is the intention of the law that the assessor should have then completed his labors. If he has omitted property, real or personal, from the list, it is made the duty of this board to enter the same for assessment. The statute (section 41) expressly provides that the assessment-books, lists, and statements shall be returned by the assessor to the county auditor on or before the first Monday of July, and we are not aware of any express provision of the tax-laws whereby any power or authority over the assessment-books is given to the assessor after he makes this return, or by which he could be permitted to perform any official act whatsoever, unless notified by the auditor of an omission, as provided by section 43. If so notified, the assessor shall ascer-

tain values, and make the necessary corrections. The county board of equalization commences its work on the third Monday of July, and is authorized to continue in session for a period not exceeding four weeks. Section 44, c. 11, *supra*, as amended by Laws 1885, c. 2, § 2, and chapter 119. Therefore, if the defendant, whose duties as assessor do not seem to have been confined to the disputed territory, complied with the law,—and we are bound to presume that he did,—the assessment-books placed in his hands had long been returned to the auditor when the order appealed from was made. Not only had this occurred, but the auditor and the county board of equalization had acted upon them, and the board had finally adjourned. So that the writ which would have followed the order would have been useless and ineffectual. The defendant could not have obeyed it, his authority to make the assessment had ended, the books had been returned to the auditor, and he was practically out of office. It is a fundamental principle of the law of *mandamus* that the writ will never be granted in cases where, if issued, it would prove unavailing. High, Extr. Rem. § 14, and cases cited. For the reason that pending this litigation, and before a determination was reached below, the right and power to make the assessment demanded had terminated, the order appealed from must be reversed, but no statutory costs will be allowed to the prevailing party. This inevitable result might have been announced without touching upon the main feature of the controversy, hereinbefore discussed at length with a conclusion adverse to appellant, but, in view of the public interests involved, it has been deemed advisable to cover that question in this opinion.

Order reversed.

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45 482**PETER HOFFMAN vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.****May 28, 1890.**

Railway—Fires—Presumption of Negligence, not Rebutted.—Upon an examination of the evidence introduced by the defendant railway corporation, in an action brought to recover the value of certain property destroyed by a fire admittedly set by one of its locomotive engines, to rebut the statutory presumption of negligence on its part, it is *held* that the same was not conclusive, but its sufficiency was for the jury to consider.

Appeal by defendant from an order of the district court for Mower county, *Farmer, J.*, presiding, refusing a new trial after verdict of \$96 for plaintiff.

Kingsley & Shepherd, for appellant.

French & Wright, for respondent.

COLLINS, J. This action was brought to recover the value of several tons of hay destroyed by a fire alleged to have been negligently set by a locomotive engine, owned and operated by defendant company on one of its lines of railway. A verdict was returned for the plaintiff, and the appeal is from an order refusing a new trial. For the purposes of the appeal, defendant concedes that the fire in question was set by a locomotive attached to one of its passenger trains, at about one o'clock in the afternoon of October 1, 1888. The day previous the same locomotive, with the same engineer and fireman, had run from Austin to La Crosse. This was the return trip, commencing at the place last named in the morning, and terminating at Austin, a few miles west from where the hay was burned, at half past one in the afternoon. The locomotive was placed in the round-house at Austin upon its arrival there, where it remained over night, at least. The fire having been reported to defendant, the inspector of engines and the foreman of the round-house made a special examination of this locomotive on the morning of October 2d, for the express purpose of learning its condition. Upon the trial it appeared that the fire started something over 70 feet from the centre of the

track, and off from defendant's right of way, among dry grass and leaves. The plaintiff introduced no evidence tending to show defendant's negligence, relying wholly upon the statutory presumption that such negligence existed from the fact of the fire. It therefore became necessary for defendant to overcome this presumption, this inference of one fact—that of negligence—from the admitted existence of another fact,—that the fire was ignited by defendant's locomotive,—by rebutting evidence as broad as the presumption itself, and to satisfactorily meet and rebut every negligent act or omission which might, under the circumstances of the case, reasonably or naturally have caused the fire. The only inquiry we have is whether the appellant fully and satisfactorily rebutted the presumption before mentioned. If it did, the verdict must be set aside; otherwise the order appealed from must be affirmed.

On the trial the engineer and fireman both testified that, so far as they knew, the locomotive was in perfect order. Neither had made anything more than a cursory examination of it,—the former while oiling its machinery as occasion required, and upon his arrival at La Crosse the night before the fire; the latter as he cleaned out the hopper and ash-pan upon the easterly and westerly runs. These witnesses also testified, in a general way, that, from the time they left La Crosse in the morning until they reached Austin in the afternoon, the locomotive was properly handled and managed. The foreman of the round-house and the inspector at Austin also stated that the locomotive was in perfect condition when they examined it on the morning of October 2d, the day after the fire. It will have to be admitted that the testimony of each of these witnesses is entitled to more than ordinary weight, because they were informed of the fire within 24 hours after it occurred, and the examination of the locomotive in the round-house was immediately and purposely made because of the fire. But the jury was not bound to accept as conclusive the statement of the witnesses that the engine was in good order or carefully or skilfully operated, although there was no direct evidence contradicting their statements. *Karsen v. Mil. & St. Paul Ry. Co.*, 29 Minn. 12, (11 N. W. Rep. 122.) If this were the law, a rule would be established

in this class of cases which does not prevail in any other. The jurors may consider all of the facts and circumstances in evidence which bear upon the method of operating the engine, or upon its condition, as well as the accuracy and appearance of the witnesses. The burden was upon the defendant to rebut the statutory presumption, and it was obliged, if it would do this, to prove each circumstance necessary to a complete rebuttal in the same manner as if the whole issue had rested upon it.

With this in mind, let us proceed to examine certain points in the evidence. The locomotive which set the fire was not the one ordinarily driven by the engineer witness, nor was it used for that train except for this one trip. Usually it was run from Austin westerly. At Austin there was a round-house, with a regular inspector and a foreman, both of whom testified as to the perfect condition of the locomotive on the morning of October 2d. The night previous it had been in the round-house at La Crosse, and the result of the inspection there, if any was had, was not made known to the jury; and the night before it made the trip easterly it had been in the round-house at Austin. If any inspection was then made, or if, in fact, the locomotive had ever received inspection in its years of use, at any time or place, prior to the fire, the witnesses failed to say so. So that upon this point we have the defendant endeavoring to escape the force of the statute by simply proving that its locomotive was in perfect condition the day after the fire was set, and without adequately attempting to prove its condition at any time previous thereto. These were omissions in the testimony which might well have been considered by the jury. We have not overlooked the fact that the netting inspector testified that from the time the locomotive was housed at Austin, after the fire, until the examination, "nothing had been done to it;" but we observe in this connection, as possibly did the jurors, that the foreman of the round-house, who presumably knew more about what was going on in the house than did the inspector, wholly omitted to testify on this point. It was quite material to this defence that it be shown upon the trial that there had been no changes made in the locomotive after its arrival at Austin.

The evidence introduced by the defendant to rebut the presumption of negligence was not conclusive, in our opinion. Its sufficiency was for the jury to consider.

Order affirmed.

OLIVER B. WHITNEY *vs.* PETER P. SWENSEN.

May 28, 1890.

Replevin against Sheriff for Property Levied on—Fraudulent Transfer.

Certain alleged errors in the rulings of the court below upon the trial of this action examined and considered. *Held*, that none of said rulings were erroneous.

Appeal by defendant, sheriff of Hennepin county, from an order of the district court for that county, refusing a new trial after a trial before *Hicks, J.*, and verdict for plaintiff for possession of the property, or for \$975, its value, and for \$45.62 damages for detention.

Laybourn & McHugh, for appellant.

Torrance & Fletcher and *J. K. Doolittle*, for respondent.

COLLINS, J. This is an action of claim and delivery, in which plaintiff had a verdict. The complaint was in the usual form, alleging that the plaintiff was the owner, and entitled to the immediate possession, of certain personal property, and that the same was unlawfully detained by the defendant. The answer denied these allegations, and averred that the property belonged to one D. R. Young, against whom a certain described judgment had been duly rendered and docketed; that an execution had been duly issued thereon, and placed in the hands of the defendant, who was the sheriff of the county in which the property was then situated, for service; and that by virtue of said execution the defendant, as sheriff, had seized and levied upon the property in question, and so held it when the action was brought. The answer further alleged that the property was in

Young's possession when so levied upon; that the plaintiff was not the owner of the same, or of any part thereof; but that, with an intent to cheat and defraud the creditors of said Young, he pretended to own, and attempted to claim the right of possession of, said property. A proper reply was made, and a trial had, with the result above mentioned. The appellant has set out 39 assignments of error, many of which are of the same import, and most of which need no special examination. We shall consider only such as seem to us to need comment.

1. There is nothing in the point made by the appellant's counsel that the action of replevin or claim and delivery will not lie against an officer to recover possession of property seized by him by virtue of an execution. The right of a stranger to the process, as well as that of the execution debtor himself in case the property levied upon be exempt, is recognized by the statutes, (Gen. St. 1878, c. 65, § 89; c. 66, §§ 133, 154, 155;) and this method of determining rights as against an officer has never been questioned in this state before, so far as we are advised. It would be somewhat remarkable, and unfortunate for owner as well as a purchaser at an execution sale, if, as appellant strenuously contends, the owner of personal property, seized by an officer to satisfy a judgment against another person, cannot recover possession of his own until it has passed into the hands of a purchaser at the sale. The counsel have entirely misapplied the rule of law announced in the cases cited by them on this point.

2. Appellant justified under an execution against D. R. Young, alleging in his answer, among other things, that Young was the real owner of the property, and that respondent was not the owner of any part of it. It is now claimed by appellant that the testimony tended to show that respondent was not the absolute owner, but that Young had a leviable interest in the chattels which had been seized by virtue of the execution. The testimony discloses that plaintiff was the owner of seven lots which he had authorized Young to sell. One Howe owned the property in dispute,—a livery-stable outfit, occupying a leased barn. A trade between plaintiff and Howe was negotiated and brought about by Young, whereby plaintiff agreed to and did convey to Howe his lots, seven in number, in exchange for the livery

stock; the latter executing and delivering to plaintiff a bill of sale of the personalty, and at the same time surrendering possession thereof. Howe also assigned his lease of the barn to plaintiff, and the stock remained therein until seized under the execution, one Loomis having charge thereof as plaintiff's employee. Howe also testified upon the trial that, when the trade was first made, Young agreed to have conveyed to him, as part of the transaction, two lots then owned by one J. F. Young, a brother; that he (the witness) afterwards declined to accept a deed from J. F. Young; and that thereupon the trade was completed by a delivery of said deed, with D. R. Young's note for \$500, into the hands of a third party, in pursuance of a written contract wherein it was agreed that both deed and note should be delivered to Howe on a certain day, unless D. R. Young should in the mean time obtain and deliver a conveyance of another designated lot from plaintiff to Howe. In such case the note and the deed should be redelivered to Young. The deed, the note, and the written contract under which they were deposited with the third party, were offered in evidence by the appellant, and, objection being made, excluded by the court. This ruling is assigned as error. In his answer, defendant had asserted that this plaintiff was not the owner of any part of the property levied upon by him; that the execution debtor, Young, was the owner thereof; and that it had been sold as his property at the execution sale. The respondent insists that appellant should not, in view of this answer, be permitted to change front, and upon the trial show that the debtor actually had an unascertained and undetermined interest in the horses and carriages by reason of having furnished a portion of the property exchanged therefor. It is unnecessary to pass upon this point, because there was no testimony received, and none offered, tending to show that, as against the plaintiff's assertion of exclusive ownership, Young had, or could have maintained, any claim whatever to an interest in the property. The bill of sale ran to plaintiff. Possession had been delivered to him. His employees had charge. He had not, either actively or passively, recognized Young as having an interest or any rights, and had done nothing which would prevent him from maintaining his claim of title as against the execution debtor, and conse-

quently as against the appellant sheriff. The only testimony indicating that plaintiff had any knowledge as to other property than his own having been considered in the trade, was that two lots owned by J. F. Young had been offered Howe. Certainly there was no evidence that plaintiff had ever heard of the written contract or the note deposited therewith. The ruling of the trial court on this point was correct.

3. A few days before the trade between plaintiff and Howe was actually consummated, but when it had been agreed upon, substantially, the former contracted to sell the entire property to E. V. Young, another brother of the judgment debtor, for the sum of \$2,600, the payment thereof to be secured by an indorsement of one of the two notes which should be given by E. V. Young to plaintiff, and by a chattel mortgage. D. R. Young was given temporary possession of a bill of sale executed by plaintiff to the proposed purchaser, under circumstances narrated by plaintiff when upon the witness stand. The proposed sale to E. V. Young was not completed; but, while the aforesaid instrument was in the hands of D. R. Young, he exhibited it, and tried to sell the property as belonging to his brother. All of these facts were allowed to be shown in support of appellant's claim of fraud; but, aside from their existence, there was no testimony in any way indicating that the contemplated sale to E. V. Young was not, so far as it went, a *bona fide* transaction, or that, if it had been consummated according to the terms agreed on, the execution debtor would have acquired a leviabie interest in the property. In the absence of proof, the jury could not have inferred to the contrary. And there is no rule of estoppel to be invoked here, as appellant contends, which can prevent the respondent from asserting title as against this undelivered bill of sale. Therefore the rulings of the trial court in regard to the knowledge which the judgment creditors had obtained of the existence and whereabouts of the bill of sale, and that, while it was in D. R. Young's hands, he had proposed to sell the property for E. V. Young, and that the creditors had acted upon this knowledge when directing a levy, were correct.

4. A witness for defendant, while testifying as to the value of the horses when seized, was asked by counsel whether horses were as

valuable then as at the time of the trial. An objection to this question made by respondent was very properly sustained by the court on the ground of irrelevancy. Thereupon the appellant's counsel persistently followed the inquiry up with an offer to prove that at the time of the trial horses were worth more than when those in dispute were levied upon, and that one pair in particular, whose value had been fixed by plaintiff at \$200, could "now" be bought for \$60. In rejecting this offer the court used some rather vigorous language in regard to the conduct of counsel in putting the objectionable question, and in his efforts to introduce testimony of that character. The latter took an exception to the remarks of the court, and urges that they were prejudicial to appellant's case. In attempting to drag into the case an issue as to the value of horses when the levy was made, as compared with their value at the time of the trial, and again in offering to prove that the pair in question could be bought for \$60 at the time of the trial, the counsel for appellant seem to have overlooked one of the principal rules of evidence,—that the testimony must be confined to the issue, must be relevant to the facts required to be proved. Here the issue was as to the value of these horses in September, not whether horses generally were worth more or less at that time than when the case was being tried, and not whether they could then be purchased for more or less than a certain sum. It was this departure from the rules of evidence which led the court to criticize the counsel. From the record in the case, it is clear to us that the court had been called upon to exercise a great deal of patience while counsel were examining into the details of the trade with Howe, and again while they wandered off into the particulars of other and distinct transactions between these parties and other persons. While recognizing the fact that counsel should be protected from prejudicial assaults of the courts, we cannot say in this instance that the remarks were wholly without warrant, or that the appellant's case was thereby prejudiced.

5. The remaining assignments of error are without merit.

Order affirmed.

CHARLES A. SMITH vs. ANNA ROBERTS and others.

May 28, 1890.

Seed-Grain Note—Prerequisites to Lien on Crop.—Former decisions of this court, *Kelly v. Seely*, 27 Minn. 385, and *Wallace v. Palmer*, 36 Minn. 126, as to the validity of a “seed-grain” note, followed, and the principles therein stated applied to the facts in this case.

Several rulings made upon the trial of this action—which was one of claim and delivery—considered and held to be correct.

Action brought in the district court for Traverse county, to recover possession of 1,000 bushels of wheat, raised by one Prescott on a farm cultivated by him, and claimed by the defendant Roberts by virtue of a chattel mortgage made to her by him. The farm was cultivated by Prescott under a contract with Bessie I. Van Doren, the owner, which contained the provisions quoted in the opinion, and also provided that until division the title to the crops should remain in Mrs. Van Doren. The plaintiff claimed title as assignee of a seed-grain note, made by Prescott to Mrs. Van Doren, and under a chattel mortgage from the latter to himself, contending that, under the contract, Prescott had no interest in the grain which he could mortgage until division made with the written consent of Mrs. Van Doren. At the trial before *C. L. Brown, J.*, the defendants had a verdict. Plaintiff appeals from an order refusing a new trial.

John I. Place and *W. H. Place*, for appellant.

J. W. Reynolds and *W. H. Townsend*, for respondents.

COLLINS, J. Appellant's assignments of error numbered one, two, and four are evidently founded upon a misapprehension in regard to a clause in the contract with Prescott under which he carried on the farm. This clause—so far as is material here—is that Prescott shall not “sell or remove, or suffer to be sold or removed, any of the products or produce of said farm or premises, of any kind, character, or description, until the division thereof, without the written consent” of the owner of the farm. The words “without the written consent” do not refer to a division of what may be produced; they simply pro-

hibit a removal of the products or produce from the premises before they have been divided, unless the owner aforesaid shall have consented in writing. The language is plain and easy of comprehension. Again, if this was not the case, but the meaning of the clause in question was as appellant assumes, the parties to the contract could dispense with or waive any of its terms. And evidence that they had agreed orally upon a division, and had actually divided the crop without writings, would not tend to vary, or alter, or contradict the terms of a written contract.

2. The trial court very properly charged the jury to disregard the so-called "seed-grain note." It was undisputed that the grain for which it was given, upon the farm when Prescott took possession, was delivered to him by its owner, the payee in the note, under an agreement for an exchange of grain. Prescott, who had wheat elsewhere, was to deliver at Herman to Mrs. Van Doren, the owner of the grain and the farm, an equal number of bushels, and thus save hauling for both parties. Later on, when he had seeded the farm with the grain so delivered him—in part, at least—he alleged an inability to comply with his part of the agreement relative to an exchange. And thereupon, at a time not exactly fixed by any of the witnesses, but probably in July, the note was made, antedated to May 1st, and delivered to Mrs. Van Doren. Under these circumstances it was not a valid lien on Prescott's share of the crop, as against respondent's mortgage. *Kelly v. Seely*, 27 Minn. 365; *Wallace v. Palmer*, 36 Minn. 126; *Nash v. Brewster*, 39 Minn. 530.

3. It is possible, as appellant argues, that if this verdict be allowed to stand, he has not received that share of the grain covered by his mortgage. But there is abundant testimony on which the jury could have found, as they undoubtedly did, that the grain was divided as it came from the threshing-machine, Prescott's share then being placed in what was known as the "middle bin" in the granary. It was from this bin that the grain in controversy was taken, and not from the bins in which had been placed that set apart to Mrs. Van Doren in the division.

Order affirmed.

COUNTY OF HENNEPIN *vs.* DAVID C. BELL and another.

May 29, 1890.

Taxes — Exemption — Property Leased for School Purposes.—The mere use and occupancy of premises for educational purposes by a school or seminary, under a lease from the owner thereof, do not entitle him to claim the benefit of the statutory exemption from taxation.

Same—Extent of Exemption.—The exemption allowed by the statute relates only to such property as the society, corporation, or trustees of such institution of learning would be bound to pay taxes on, as owner, but for the exemption.

Same—Statute Strictly Construed.—Statutes exempting property from taxation are to be strictly construed.

Case certified from the district court for Hennepin county, by Hooker, J., in proceedings to enforce payment of delinquent real-estate taxes.

Robert Jamison and Frank M. Nye, for plaintiff.

Harlan P. Roberts, for defendants.

VANDERBURGH, J. Prior to the levy of the taxes in dispute here upon the property described in the record, the present owners, Bell and Maloney, had become the owners thereof by purchase, and had leased the same to the trustees of an institution of learning known as "Bennett Seminary," at a stipulated annual rental, and the premises were occupied by the seminary during the year for which such taxes are sought to be enforced. Bell and Maloney claim that the property is exempt from taxation because of such occupancy of the premises by the seminary, under Gen. St. 1878, c. 11, § 5, which provides that "all property, * * * to the extent herein limited, shall be exempt from taxation; that is to say: All public school-houses, academies, colleges, universities, and seminaries of learning, with the books and furniture therein, and the grounds attached to such buildings necessary for their proper occupancy, use, and enjoyment, and not leased or otherwise used with a view to profit." The object of such exemption is undoubtedly to promote the cause of

education, by fostering and encouraging the establishment and maintenance of institutions of learning. The buildings, with the necessary grounds, furniture, and other personal property mentioned, are exempt from taxation as the property belonging to such institutions; and the exemption will therefore be intended to extend to the property of the trustees, corporation, or party under whose control they are, within the specified limitations. The property "leased or otherwise used with a view to profit" evidently refers to the property belonging to the institution itself, or held in trust for it; but there can be no distinction, as respects the tenure by which the property mentioned in the statute is held, between that which is in actual use for the purposes of the institution and that which it leases to others. But it would hardly be necessary to introduce into the statute the limitation just referred to, if use or occupancy was the sole test of the right of exemption; and under the strict rule of construction adopted by this court, it must clearly appear that the property is entitled to the privilege of exemption. In *St. Peter's Church v. County of Scott*, 12 Minn. 280, (395,) it is said: "No property should be exempt from taxation in the absence of clear and explicit legislation authorizing the same, and in the construction of a law exempting property from taxation, courts will indulge no presumption that will extend the exemption beyond the plain requirements of the law itself." That is to say, the claim to the privilege of exemption must be supported by the plain language of the statute. It does not clearly appear from our statute that property leased and used by an educational institution is intended to be exempt. If it had been the intention of the legislature to exempt all property exclusively used for educational purposes, it would have been very easy to have said so, as it is clearly expressed in the statutes of some of the states. *Washburn College v. Com'rs*, 8 Kan. 344. As before suggested, the object of the statute was to benefit the public by exempting the property of institutions of learning. But the lessors claiming the benefit of the exemption in this case are mere private owners of the property, and the exemption is not for the lessees, the trustees of the seminary, and it can only be claimed *arguendo* to be for their benefit in an indirect and collateral way. *Black v. City of Brooklyn*, 51 Hun, 581,

(4 N. Y. Supp. 78.) It we are right in our construction, then the mere use for school or educational purposes of the property of a private owner, sustaining merely the relation of lessor to a school or seminary, does not create an exemption in his favor. In short, as respects seminaries and educational institutions, the statute has reference to such buildings, with the site, which the society, board, corporation, or trustee representing such institution, and holding its property, would be bound to pay a tax on as owner but for the exemption. *People v. Assessors*, 32 Hun, 457, 97 N. Y. 648; *Montgomery v. Wyman*, (Ill.) 22 N. E. Rep. 845.

Order affirmed.

43 346
46 114
45 416

GOVERNEUR W. MORRIS and others *vs.* JAMES McCLARY.

June 2, 1890.

Evidence—Identity of Name.—Identity of name, is usually, in the first instance, sufficient to prove identity of person.

Adverse Claims—Claim Based on Legal Title—Laches not a Bar.—

In the action under the statute to determine adverse claims to real estate, if a party relies on a legal title and seeks no equitable relief, his right to relief is barred only by the lapse of time prescribed by the statute of limitations. The equitable rule as to laches defeating relief sought, applies only when the relief sought is equitable.

Adverse Possession of One of Several Lots, under Deed. — Where a person is in actual adverse possession of only one of several distinct and separate tracts or lots not in the same enclosure, under a deed of them to him, the deed will not define or extend his possession so as to include those of which he is not in actual possession; as if his deed describe by lot and block several, or even the greater number, of the lots in a platted town-site or addition, his actual possession of one will not, for the purpose of adverse possession, extend to those unenclosed lots of which he is not in actual possession.

Plaintiffs, heirs-at-law of Arthur B. Morris, of New York, who died in that city August 11, 1869, brought this action in the district court for Hennepin county, to determine the defendant's adverse claim to lot

2, in block 45, of Baker's fourth addition to Minneapolis, being vacant and unoccupied land. On June 24, 1857, one J. G. Sherburne, of Minneapolis, was the owner of the lot in dispute, and on that day he conveyed it, with other property, to Arthur B. Morris, whose place of residence was not mentioned in the deed, and whose identity with plaintiffs' ancestor was put in issue by defendant. The defendant, denying plaintiffs' title, pleaded adverse possession in himself and his grantors under the conveyances mentioned in the opinion. At the trial, before *Young, J.*, there was no evidence, aside from the deed of Sherburne, to show that the grantee in that deed and the plaintiffs' ancestor were the same person. The facts found by the court in regard to the adverse possession relied on by defendant are stated in the opinion. Judgment was ordered for plaintiffs, and the defendant appeals from an order refusing a new trial.

Stocker & Matchan and *A. B. Choate*, for appellant.

Geo. C. Ripley, C. E. Brennan, S. A. Booth, and Jackson & Atwater, for respondents.

GILFILLAN, C. J. To prove identity of person, identity of name is usually, in the first instance, sufficient. 1 Gr. Ev. § 575, and note; 2 Phil. Ev. 509, and note; Abbott's Trial Ev. 101. Very slight evidence may be sufficient to overcome the presumption of identity of person which identity of name raises, so as to put upon the party claiming such identity the necessity of further proof; but until there is something to raise a doubt upon it, it is ordinarily enough. In this case there is nothing to raise a doubt that the Arthur B. Morris, to whom the land in controversy was conveyed in 1857, whose residence is not given in the deed of conveyance, was the Arthur B. Morris who died in New York City in 1869.

In the statutory action to determine adverse claims to real estate, the defendant may undoubtedly plead and have determined an equitable title in himself, as against a legal title relied on by the plaintiff, and, as to such equitable title, the equitable rule as to laches would apply. But where only strictly legal rights are in controversy, no neglect in asserting the right, short of the time prescribed by the statute of limitations, will bar the appropriate legal remedy. If the holder of the legal title seeks equitable relief, unreasonable delay in

asserting his right may, under the equitable rule as to laches, bar his claim to such equitable relief in less time than would, under the statute of limitations, bar his legal remedy. But, where there is no estoppel, his legal remedies will be barred only by the statute of limitations.

To set the statute of limitations in operation against plaintiffs' legal title and the right to the appropriate legal remedy, it was necessary that there should be a disseisin of them or their ancestor; and to complete the bar of the statute, it was necessary for the disseisin to continue for twenty years. The facts found by the court below show a disseisin, but do not show that it continued for the requisite length of time. For the purpose of disseisin and the establishing of an adverse possession within the statute, a deed of the land or color of title to it is not equivalent to actual, open, and notorious possession. It merely serves, in some cases, to define the extent of the party's possession. If one has a deed or color of title to one entire tract of land, as to one whole lot or farm, which is unenclosed, and he is in actual possession of a part, the remainder not being actually occupied by any one, his deed or color of title will, ordinarily, extend his possession to the entire tract for the purpose of showing adverse possession. But the rule does not apply where the deed or color of title is to several distinct lots or tracts. In that case his actual possession of one will not be extended by his deed, so as to put him constructively in possession of the others. Tyler on Ejectment, 900.

The land, adverse possession of which was sought to be shown, consisted of three government forty-acre pieces, which, in 1857, were duly platted as an addition to North Minneapolis. This plat remained in force till July 15, 1865, when it was vacated by a decree of the district court. While the plat continued, lots and blocks were conveyed and mortgaged to different persons. In 1864, R. J. Baldwin acquired color of title, through a tax-deed, to some of the lots. In 1866, he acquired title to others, through the foreclosure of a mortgage executed by the owners of the lots. In 1867, he received a tax-deed (void) to others of the lots. In 1866, he executed a deed of the three forty-acre pieces to Andrew T. Hale. At that time Baldwin's

title and color of title extended to the greater part though not to all of the lots. Prior to that time only one of the forties (not including the lots here in controversy) was enclosed. The other two forties were open and in a state of nature, not actually occupied by any one. Baldwin's color of title being only to separate and distinct lots, his possession of such of the lots as were within the enclosed forty could not, according to the rule we have stated, extend, by virtue of the deeds to him, so as to put him constructively in possession of the lots claimed by him in the other two forties,—certainly not while the lots remained separate and distinct by the plat remaining in force. The court below seems, in the matter of admitting or excluding evidence, to have tried the case on the theory that while, prior to the vacation of the plat, Baldwin's actual possession of some of the lots claimed by him would not draw to it the constructive possession of the other lots, it might have that effect after the vacation. As this rule was fully as favorable to the defendant as he was entitled to, we will not consider whether it is strictly accurate.

We will not go through the numerous assignments of error based on the rulings of the court excluding evidence offered by defendant to show adverse possession. Generally they were correct. In some instances they may appear to have confined the defendant too strictly, but in all such instances the error, if any, was cured and rendered harmless, by admitting fully all proof offered of what was alone competent to prove as to acts prior to the vacation of the plat,—to wit, all acts of actual possession.

The adverse possession of which defendant may have the advantage, so far as it depended on constructive possession by virtue of a deed, commenced with Andrew T. Hale in October, 1866. He and his successors in interest kept tenants in possession under successive leases of the three forties till 1882, when the premises were conveyed to Willis Baker, who appears to have platted them as "Baker's Fourth Addition," and in December, 1882, he conveyed the land in dispute here to Libeus Andrus, from whom by diverse mesne conveyances defendant claims title. Andrus did not go into possession, so that the continuity of adverse possession was broken upon the conveyance to him, unless there might be credited to him, as his possession, the

constructive possession, under a lease for years, of a tenant of Baker's grantor, whose term had not expired when the land was conveyed to Baker. But that tenant went out in the spring of 1885. Dating the commencement of the adverse possession with the conveyance to Andrew T. Hale, even though there be added to the time it continued the time the tenant remained in possession, the time falls short of twenty years.

Upon the evidence it would have been hard to sustain a finding that there was any adverse possession of the unenclosed two forties prior to the conveyance to Hale, in October, 1866.

Order affirmed.

STATE OF MINNESOTA *vs.* G. C. JOHNSON.

June 2, 1890.

Agent of Foreign Insurance Company—Certificate Requisite.—In an indictment under Gen. St. 1878, c. 34, § 292, as amended by Laws 1879, c. 54, for acting as the agent of an insurance company not of this state, without the proper certificate of authority from the insurance commissioner, it is immaterial that the company had or had not complied with the statute.

Evidence *held* insufficient to sustain a verdict of guilty.

Appeal by defendant from an order of the district court for Goodhue county, *Crosby*, J., presiding, refusing a new trial.

J. C. McClure and *S. J. Nelson*, for appellant.

Moses E. Clapp, Attorney General, and *F. M. Wilson*, for the State.

GILFILLAN, C. J.¹ Indictment under the provisions of Gen. St. 1878, c. 34, § 292, as amended by Laws 1879, c. 54, making it a misdemeanor for any person to act as agent in this state for any insurance company not of this state, in any matter relating to risks, without having a certificate of authority from the insurance commissioner. Exception is taken to the indictment, in that its attempt

¹ Vanderburgh, J., took no part in this decision.

to state the failure of the company to comply with the requirements of the statute is a mere conclusion of law. This is immaterial. It was not necessary to state such failure of the company. The offence is not acting as agent for a foreign company which has failed to comply with the law, but acting for such company without the commissioner's certificate of authority. The certificate is, so far as this statute and the state are concerned, his authority to act. If he has it in due form, so long as it is unrevoked, he cannot be convicted, though the company may, in fact, have failed to comply with the law; if he has it not, it is no defence for him that the company has complied.

There is no evidence to sustain the verdict. There was no attempt to show that defendant ever acted or assumed to act, generally, as the agent for the foreign insurance company, but only an attempt to show that he acted as agent for the company in the matter of one policy. When the state closed its case, the fact appeared that the policy had been issued, but no agency of defendant in connection with it was shown. There was no evidence from which it could be inferred that he ever solicited the insured to be insured by the company, that he ever undertook to have the policy issued, or that he did have it issued, or had any part in procuring it to be issued. The defendant was sworn in his own behalf. His testimony did not conflict with that on the part of the state, but supplemented it, and showed, what the state's evidence failed to show, his connection with the policy. From that it appears that on the application of the insured he had previously, as agent for such companies, issued two policies in authorized companies. One of these was cancelled, and then defendant, pursuant to instructions from the agent of the insured, and acting on behalf of the insured, applied to a firm of insurance brokers in another state to get other insurance in lieu of the cancelled policy. They sent him a policy in the unauthorized company, and he sent it to the person for whom it was intended. Until the policy came to him he had never heard of the company issuing the policy. The entire evidence failed to show any act of his as agent for the company.

Order reversed.

GILBERT A. ELLEGARD *vs.* NELS AOKLAND.

June 2, 1890.

Evidence *held* sufficient to sustain the verdict.

Action brought in the district court for Freeborn county, to recover damages for the destruction of plaintiff's growing trees by a fire negligently kindled by defendant on his own adjoining land. At the trial before *Farmer, J.*, it appeared that the fire was set by defendant's son, and the plaintiff had a verdict of \$200. The defendant appeals from an order refusing a new trial.

John Anderson and *John Whytock*, for appellant.

Lovely & Morgan and *D. F. Morgan*, for respondent.

GILFILLAN, C. J. The only point made by appellant is as to the sufficiency of the evidence to charge him with the negligence of his son in setting the fire which destroyed plaintiff's property. There was enough to show that the son was employed by him, not merely to do some one specified thing, as to plough a particular field, but as a general farm hand, and that within the scope of his employment was to do the grubbing, to facilitate which he set the fire. Where a master authorizes a servant to work for him, the former is liable for injury to another caused by the latter's negligent manner of doing the work, or by some negligent act of his done in the course of and for the purpose of performing the work, even though the master may have forbidden him to be negligent, or to do the negligent act. Authority to the servant to be negligent is not required to make the master liable. The evidence was sufficient.

Order affirmed.

MASONIC TEMPLE ASSOCIATION OF MINNEAPOLIS vs. SEWELL P. CHANNELL.

June 2, 1890.

43	353
46	493
43	353
63	539

Corporation—Written Stock-Subscription—Oral Condition.—When a subscriber to the stock of a corporation is sued on his written subscription, it is incompetent to prove an oral condition to the subscription.

Same—Action—Requirement that All the Stock be Subscribed.—The statute (Gen. St. 1878, c. 34, § 4) does not abrogate the common-law rule that, where the charter or articles of a corporation, or the terms of subscription to its capital stock, do not provide otherwise, payment of a subscription cannot be required till the whole capital stock is subscribed.

Same—Waiver of Requirement by Acts of Shareholder.—But the subscriber may waive that defence. Acts done by him, as stockholder or director, which constitute a part of the business for which the corporation is formed, and which from their nature assume it to be ready for business, and evince a willingness to enter upon that business, with the stock already subscribed, will amount to a waiver.

Same.—Certain acts of defendant as a director *held* a waiver.

Appeal by defendant from an order of the district court for Hennepin county, refusing a new trial after a trial by *Lochren, J.*, and judgment for \$500 and interest ordered for plaintiff.

Gilfillan, Belden & Willard, for appellant.

Ankeny & Merrill and *Little & Nunn*, for respondent.

GILFILLAN, C. J. The action is upon defendant's subscription to the capital stock of the plaintiff. Upon a trial without a jury, the court below ordered judgment for the plaintiff, and from an order denying defendant's motion for a new trial he appeals.

The appellant makes the points that the plaintiff never accepted his subscription, it having been made before the corporation was organized; that one of the calls or assessments upon the subscribers was not properly made, because it was ordered at a meeting of the directors at which there was not a quorum present; and that appellant had not due notice of four of the calls. Upon all these points the court found the facts against him, and the evidence sustains the findings.

v.43M—23

He also complains that the court below excluded evidence offered by him that, at the time of subscribing, he orally made it a condition that the corporation should incur no debt. As the contract of subscription was in writing, of course the evidence was incompetent.

The chief matter of defence was that the whole capital stock of the plaintiff has not been subscribed. No question is made that at the common law, when the charter or articles of incorporation, or terms of the subscription, make no different rule, payment of subscription to the capital stock of a corporation cannot be required until the whole amount of stock has been subscribed. There were solid reasons for the rule,—reasons based not only on considerations of public policy, but on the presumed understanding and intention of the subscriber to stock. The amount of capital stock of a corporation is presumed to be fixed at what the parties interested suppose will be required for the successful prosecution of the enterprise or business for which it is formed; and, while one might be willing to take stock if such amount is to be raised before the enterprise is to be entered upon, he might not be willing to take and pay for it, leaving it uncertain that the requisite amount will be raised. It is therefore implied in the contract of subscription, as a condition precedent to its being of force, that the entire amount of stock shall be subscribed for. Of course, if the articles of incorporation provide that payment of subscriptions may be called for before the whole stock is subscribed, that, as between the parties, is binding. We do not think the clause in Gen. St. 1878, c. 34, § 4, (being in the part of the chapter pursuant to which this plaintiff was organized,) "when articles are filed, recorded, and published as aforesaid, the persons named as corporators therein become a body corporate, and are authorized to proceed to carry into effect the objects set forth in said articles in accordance with the provisions of this title," was intended to abrogate, as between the corporation and the subscribers to its stock, the wholesome rule of the common law we have referred to. Whether it bars the right of the state to object to a corporation proceeding with its enterprise before its stock is fully subscribed for, need not be considered in this action.

It may be regretted that there has been any relaxation of that rule.

But it is so thoroughly established that a subscriber to stock may by his acts debar his right, when called upon to pay for his stock, to object on the ground that the entire stock has not been subscribed for, as to be no longer an open question. The appellant does not question it. The rule is stated in Cook, Stocks, § 181: "A subscriber may waive the defence that the full capital stock of the corporation has not been subscribed. This waiver may be either express, or implied from the acts or declarations of the subscribers." The appellant claims that the waiver must amount to an estoppel; the respondent, that acts or declarations of a subscriber showing an intent not to object that the full stock has not been subscribed, are sufficient, although a technical estoppel may not be shown. Some of the cases cited use the word "waived," others, the word "estopped." An estoppel *in pais*, as the word is usually employed and applied, includes the fact that the party claiming the estoppel relied upon and acted upon the acts or declarations, so that he will be prejudiced if the other party is not held to them. We do not find that the cases referred to using the word "estoppel," and holding that the subscriber was or was not estopped, use the word in this sense. Thus, in *Cromford & High Peak Ry. Co. v. Lacey*, 3 Younge & J. 80, certain acts were held to estop the defendant, though it did not appear that either the corporation or other subscribers had in fact been influenced by his acts; the court only saying that others may have been thereby induced to subscribe. So, in *Hager v. Cleveland*, 36 Md. 476; *Garling v. Baechtel*, 41 Md. 305; *Schloss v. Montgomery Trade Co.*, 87 Ala. 411, (6 South. Rep. 360;) *Corwith v. Culver*, 69 Ill. 502; *Centre, etc., Turnpike Road Co. v. M'Conaby*, 16 Serg. & R. 140; *Clark v. Monongahela Navigation Co.*, 10 Watts, 364,—the courts, in stating what will estop the subscriber, or prevent his being heard to make the objection, refer only to his acts, and do not include the fact that they did influence others. If a technical estoppel were required to prevent a subscriber withdrawing his subscription on the ground that the full stock has not been subscribed, much fraud might be committed; for, if it must be shown that the corporation or some subscriber, of whom there may be many hundreds or even thousands, was in fact influenced by the acts of the subscriber who seeks to

withdraw, it might be impossible to prove the fact, even though it exist. The safer rule in such a case is that, if his acts are of such a character that either the corporation or subscribers may have been induced by them to act, and will be prejudiced if he be permitted to withdraw, he shall be held to have waived, or to be estopped to assert, the defence. It is immaterial which word is used, except, perhaps, for the sake of strict verbal accuracy.

There are a great many decisions determining what acts will and what will not prevent the subscriber making this defence. It would be unprofitable to refer to the cases in detail, for they are not entirely agreed; some cases holding certain acts to be sufficient, others holding similar acts insufficient. The general rule we deduce from all of them is that participation in acts done for perfecting the organization of the corporation, and setting it on its feet for business,—such as preparing and procuring the execution of the articles, procuring subscriptions to its stock, preparing by-laws for its government, and the like,—will not be regarded as a waiver of the defence, or as an estoppel against asserting it, for these are things proper, and to some extent necessary, to be done, although the full amount of stock be not subscribed; but that his acts as stockholder or director, the doing of which constitutes a part of the business for which the corporation is formed, and which from their nature assume it to be ready for that business, and evince a willingness to enter upon that business, with the stock already subscribed, will be sufficient.

Tested by this rule, the defendant had waived his right to object that the whole amount of stock was not subscribed. The enterprise for which the corporation was formed was the erection and maintenance of a building in the city of Minneapolis. Defendant was one of its first board of directors. He was present at the first meetings of the board, and took an active part in the matter of selecting a site for the building, and ascertaining upon what terms a site could be purchased, and was chairman of a committee appointed for that purpose, reported in favor of a particular site, and voted on a motion in favor of that site,—voted upon, though against, a motion to adopt another site. It was not until the board had determined upon the latter site that he made any objection that the stock was not all sub-

scribed. Up to that time he was willing the directors should proceed with that part of the business of the corporation. The articles of incorporation did not provide for constructing a building on a designated site, if it could be obtained, in which case the ascertaining if it could be got might be deemed preliminary to entering on the business of the corporation; for its going on would depend on that. The articles contemplated the erection of the building on any site that the corporation might select and purchase. The selection of the site was part of the business for which it was organized,—as much so as the purchase after the selection, or constructing the building after the purchase.

Order affirmed.

JOHN ELLIOTT and another *vs.* JENNIE CALDWELL and Husband.

June 2, 1890.

Building Contract—Substantial Compliance.—The doctrine of “substantial compliance” of building contracts does not apply when the omissions or departures from the contract are intentional, and so substantial as not to be capable of remedy, and that an allowance out of the contract price would not give the owner essentially what he contracted for.

Same—Recovery for Partial Performance, when Allowable.—To entitle a party to recover for part-performance or for performance in a different way from that contracted for, his contract remaining open and unperformed, the circumstances must be such that a new contract may be implied from the conduct of the parties to pay a compensation for the partial or substituted performance. The mere fact that the partial performance is beneficial to a party is not enough from which to imply a promise to pay for it. Hence, in the case of a building on land, which the builder fails to complete, or completes in a manner not substantially conforming to the contract, the mere fact that it remains on the land, and the owner enjoys the benefit of it, he having no option to reject it, is not such an acceptance as will imply a promise to pay for it, notwithstanding the non-performance of the special contract.

43	357
46	470
43	357
60	396
43	357
79	435
43	357
86	388

Same—Complaint.—The complaint construed, and *held*, that the cause of action stated in it is only on the special contract, and not on an implied one to pay the measure and value price of the work done.

Same—Evidence.—The findings of the referee *held* justified by the evidence.

Appeal by plaintiffs from an order of the district court for Hennepin county, *Hooker, J.*, presiding, refusing a new trial after a trial before Arthur J. Shores, Esq., as referee, and judgment ordered for defendants.

Welch, Botkin & Welch, for appellants.

Davenport & Thian, for respondents.

MITCHELL, J. We have carefully read the evidence in this case, and are satisfied that it amply justified all the material findings of fact by the referee. Upon the facts thus found, it is impossible for the plaintiffs to recover in this action. They declare upon a written contract, by which they agree to build for the defendant Jennie Caldwell, according to certain plans and specifications, a dwelling-house for a gross sum. They allege that before they made their bid or executed the contract, it was agreed that certain changes were to be made in the plans and specifications, and that they made their bid and entered into the contract with reference to such agreed changes, which were, however, through mistake or inadvertence, never made. They further allege that they have fully performed their contract by constructing the house according to such plans and specifications as thus agreed to be changed, and ask that the written contract (of which the plans and specifications are a part) be reformed so as to conform to the intention and actual agreement of the parties; that they have judgment for the amount of the contract price; and that the judgment be declared a specific lien on the building. The defendants in their answer deny all the facts set up in the complaint as a ground for the reformation of the written contract, which they allege correctly embodies the actual agreement. They also deny that plaintiffs have performed their contract, but allege, on the contrary, that they have fraudulently, and by means of a conspiracy between them and one Jones, the person named in the contract as the super-

visor of the construction of the building, made numerous material and substantial deviations and departures from the contract by using different and inferior and defective material, and doing different and inferior work, from that called for in the specifications, so that the house is essentially different from and inferior to the one contracted for. The referee finds that plaintiffs executed the written contract with full knowledge of its contents, and without any mistake or oversight. He also finds that plaintiffs have not completed or constructed the building in substantial compliance with this contract, but have omitted altogether certain things, and have deviated and departed from it in numerous particulars as to the kind and quality of both the materials and the work, which he specifies. Without enumerating these, it is enough for present purposes to say that, taken as a whole, they are not mere slight defects or omissions, which may be remedied without difficulty, so as to give defendants substantially the building they bargained for, but that they are of a substantial nature, which run through the whole work, and are now incapable of correction, and render the house substantially different from and inferior to the one which plaintiffs contracted to build. Jones, the supervisor, was discharged, and a new one appointed December 4th, after the building was up and inclosed, and sheathing, siding, and roof-boards on, and the windows in, and the floor-joists, floor-lining, studding, etc., up. From the referee's description, it appears that at this date the plaintiffs had already made the greater number of the most material departures and deviations already referred to. The referee further finds that all departures and deviations from the specifications by plaintiffs prior to that date were made with the knowledge and consent of Jones, but without the knowledge or consent of the defendants; also that they were made by plaintiffs well knowing that the same were unauthorized by the defendants, and for the purpose of defrauding the defendant Jennie Caldwell; that the last work was done by the plaintiffs on the building on May 3d; that on May 16th defendants moved into it, and occupied it; that before doing so they requested plaintiffs to complete it in conformity with the plans and specifications, which they refused to do; that the defendants have never at any time accepted the building as complete,

or as erected in conformity to the requirements of the contract. The referee also states that he is unable to find from the evidence that the defendants ever excused the plaintiffs from conforming to the specifications in any of the particulars specified. This is equivalent to a finding in the negative, or that the fact was not proved.

Upon such a state of facts, the plaintiffs cannot recover on the express contract, because they have not performed it on their part, and performance is a condition precedent to payment. They have not at all brought themselves within the liberal rule of "substantial performance" laid down in *Leeds v. Little*, 42 Minn. 414, (44 N. W. Rep. 309,) for the omissions and deviations were not slight and easily remedied, but substantial, and remediless except by tearing down and rebuilding the structure. Neither were they the result of mistake or oversight, but intentional and even fraudulent. And we may remark here, in passing, that the very nature of the deviations, as in using inferior and defective material all through the building, is intrinsic evidence strongly supporting the finding that plaintiffs acted fraudulently. No case, we think, can be found where the doctrine of "substantial performance" was applied to such a state of facts. To justify a recovery upon the contract as substantially performed, the omissions or deviations must be the result of mistake or inadvertence, and not intentional, much less fraudulent; and they must be slight or susceptible of remedy, so that an allowance out of the contract price will give the other party substantially what he contracted for. They must not be substantial and running through the whole work, so as to be remediless, and defeat the object of having the work done in a particular manner. And these are questions of fact for the jury or trial court. *Olmstead v. Beale*, 19 Pick. 528; *Woodward v. Fuller*, 80 N. Y. 312. It may seem a harsh doctrine to hold that a man who has built a house shall have no pay for it, but the other party can well say: "I never made any such agreement. I agreed to pay you if you would build my house in a certain manner, which you have not done." The fault is with the one who voluntarily violates his contract.

The plaintiffs, however, contend that, even if they are not entitled to recover upon the express contract, they are entitled to recover upon

an implied contract the measure and value price of their labor and material. They claim that the evidence shows that, at least after December 4th, the defendants, with knowledge of these deviations from the contract, without objection permitted them to go on and expend money and labor on the building, and have since occupied it, and are enjoying the benefit of it. It is sufficient answer to this to say that the plaintiffs did not in their complaint predicate their right of recovery on any such ground, and there is nothing in the record to indicate that the parties voluntarily litigated any issue outside the pleadings. The plaintiffs declared expressly and exclusively upon the written contract which they sought to have reformed and enforced. It is true that they alleged in their complaint that their labor and material were reasonably worth the contract price, but they nowhere allege any other contract for its performance or promise to pay for it except the written one. The allegation that the work was accepted by the defendants can only mean that they have accepted it as performance of the express contract,—a fact which is found against them by the referee. But, even if the issue had been in the case, the most that could be claimed for the evidence is that the existence of any implied contract to pay the measure and value price was one of fact for the referee; and plaintiffs have no finding in their favor on any such issue. That there are cases where, the special contract remaining open and unperformed, an action may still be maintained to recover compensation for what the plaintiff has done under it, cannot be doubted. See *Cutter v. Powell*, 6 T. R. 320, 2 Smith, Lead. Cas. 1212. Without entering into any general discussion of this subject, we may say generally, as applied to cases like the present, that such an action can only be maintained where a new contract may be implied from the conduct of the parties to pay a remuneration commensurate with the benefit derived from the partial performance; for an express contract necessarily excludes a contemporaneous implied one in relation to the same matter. The acceptance of the benefit of a partial performance, or of performance in a way different from that contracted for, where the party has the option of returning or rejecting the consideration performed, will usually be sufficient to imply a promise to pay a compensation commensurate

with the benefit accepted. But the mere fact that a part-performance has been beneficial is not enough to render the party benefited liable to pay for the advantage. It must appear that he has taken the benefit under circumstances sufficient to raise an implied promise to pay for the work done, notwithstanding the non-performance of the special contract. Therefore, in a case of a building on land under a contract which the builder fails to complete, or which he completes in a manner not conforming to the contract, so that the owner cannot be charged with the contract price, the mere fact of the building remaining on the land, and that the owner resumed possession and enjoys the fruits of the labor, is not such an acceptance as alone will imply a promise to pay for it; for the possession of the land necessarily involves possession of the buildings in their existing state, and the owner has no option of rejecting them. Leake, Cont. 68; *Munro v. Butt*, 8 El. & Bl. 738. But it is unnecessary to pursue this subject further, for the question whether the defendants by their conduct waived the special contract, and impliedly promised to pay for a substantially different and inferior building according to its reasonable value, was not an issue in the case; and the finding that they never accepted the building as performance of the express contract is abundantly supported by the evidence.

The newly-discovered evidence was purely cumulative, and, as to the only really material part of it, the plaintiffs furnished no sufficient excuse for not producing it at the trial.

Order affirmed.

JOHN BURRELL vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

June 2, 1890.

Guardian—Conveyance to Railway Company—Effect of Confirmation by Probate Court.—The approval and confirmation of the probate court, indorsed upon or annexed to a conveyance by a purported guardian to a railway company, pursuant to Gen. St. 1878, c. 57, § 36, is no proof that the person who executed the conveyance was such guardian; following *Dawson v. Helmes*, 30 Minn. 107.

Action brought in the district court for Scott county, to recover \$1,000 damages for trespasses on land of plaintiff. Defence, title in defendant under the conveyance mentioned in the opinion. A jury was waived and the action tried by *Edson, J.*, upon whose decision a judgment was entered for defendant, from which the plaintiff appeals.

Southworth & Collier, for appellant.

W. H. Norris, for respondent.

MITCHELL, J.¹ The premises upon which the alleged trespass was committed belong to plaintiff as one of the heirs and grantee of the other heirs of James Burrell, unless defendant acquired title under a deed purporting to have been executed in 1871 by one Kinghorn as guardian of these heirs, then minors, pursuant to Gen. St. 1878, c. 57, § 36. The only evidence offered by defendant in support of its claim of title was (1) a certified copy of a petition to the probate court by Kinghorn and the chief engineer of the Hastings & Dakota Railway Company, (to whose interests the defendant has succeeded,) in which Kinghorn styled himself guardian of these minor heirs, and stated that as such guardian he had, pursuant to the statute, agreed to sell and convey to the railway company the interest of the heirs in this land for \$500, and prayed the court to approve the sale, and indorse the same on the deed; (2) a certified copy of the record in the office

¹ Vanderburgh, J., took no part in this case.

of the register of deeds of a conveyance to the railway company purporting to be executed by Kinghorn as guardian, with the confirmation and approval of the sale and deed by the probate judge recorded in connection therewith. It affirmatively appeared that there are no records or files of any kind in the probate office of any appointment of Kinghorn as guardian, or of any proceedings in any such matter, except the petition referred to, with the indorsement of filing by the probate judge; and there is no evidence that any such records or files had ever existed, and had been lost or destroyed. There was, therefore, absolutely no evidence that Kinghorn ever was appointed guardian, unless that fact was proved by, or is to be presumed from, the fact that the probate judge confirmed the sale and approved the deed which he assumed to make and execute in that capacity. And such is the contention of defendant's counsel. Invoking the doctrine that the records of the probate court import absolute verity, and that its proceedings, in any case falling within the classes of subjects included in its constitutional jurisdiction, possess the same presumptions in favor of jurisdiction and regularity possessed by the proceedings of superior courts of common-law jurisdiction, and which cannot be impeached in collateral proceedings, he contends that in confirming and approving the sale the probate court adjudicated every fact necessary to make the sale valid, including the fact that Kinghorn was the legal guardian, and that this adjudication is conclusive.

This contention is based upon an erroneous assumption as to what was passed upon and adjudicated in confirming the sale and approving the deed. It merely adjudicated and determined that the sale was a proper one to be made, and that the price paid was an adequate one. The question of the appointment of a guardian, or the validity or fact of such an appointment, was not involved. A guardian's sale presupposes the existence of a guardian; and, if there was no guardian, there was no guardian's sale, and nothing for the order of confirmation to act upon. It was never heard, in the case of any judicial sale, that the action of the court in confirming the sale was an adjudication as to the existence or validity of a judgment or decree authorizing the sale, or that the person who made the sale was such officer as he assumed to be. The order of confirmation is merely an

adjudication that the "sale proceedings" are regular, and in accordance with the execution, process, or decree under which the sale was assumed to be made, and that the sale was fairly conducted, and the price obtained an adequate one. If the sale was void because there was no judgment authorizing a sale to be made, or because, for any reason, the person making it had no authority to make one, no number of confirmations could make it valid. This was held in *Dawson v. Helmes*, 30 Minn. 107, (14 N. W. Rep. 462,)—a case which fully covers and controls the present one. In that case we held that the order of confirmation adjudicated only that the sale was regularly made and fairly conducted, and that the sum bid was not disproportionate to the value of the property, but was not proof that the party making it was guardian. It is true that in that case the sale was one purporting to be made under the statutes regulating ordinary guardians' sales, while the sale in the present case purported to be made under the special provisions regulating sales to railway companies. As the sale proceedings are different in the two cases, this would make some difference in the particular facts which the court would have to pass upon in confirming or approving the sale, but none as to the scope or general effect of the confirmation as an adjudication. The case of *Menage v. Jones*, 40 Minn. 254, (41 N. W. Rep. 972,) relied on by counsel, is clearly distinguishable. That was a case where the probate court had granted a license to a guardian in New Hampshire to sell real property in this state, and the jurisdiction of the court to grant the license was attacked by attempting to show that the licensee had no valid appointment as guardian in New Hampshire. This court held that the jurisdiction of the probate court did not depend upon the validity of the appointment in New Hampshire; that, upon the hearing, the very question which the court had to pass upon was whether the petitioner was guardian by appointment in that state, and, having jurisdiction to pass upon that question, any judicial error which the court might make in deciding it could not affect its jurisdiction. In such a case the authority of the guardian to make the sale is not derived from the appointment in another state, but solely from the license of the court here, which, while in form a license, is in legal effect an appointment as guardian *pro hac vice*, and a

license, both in one. The finding of the court that Kinghorn was guardian is therefore without evidence to support it.

The defendant attempted to establish an equitable defence by estoppel, and for that purpose introduced in evidence all the proceedings in the administration of the estate of James Burrell, deceased, which showed that Kinghorn was administrator of that estate, and that as such he charged himself, and credited the estate, with the \$500 which he received from the railway company for this deed, and also, perhaps, tended to show that he had used this money for the benefit of the estate, in paying debts and expenses of administration. It is claimed that, although these heirs never received any of this money, yet they indirectly got the benefit of it, because, if it had not been used for the benefit of the estate, it would have been necessary, in order to pay debts, to sell some of the land which descended to the heirs from the decedent, their father, and therefore they are now estopped from asserting the invalidity of this deed unless they refund the consideration which the railway company paid for it. With all due deference to the very able counsel, we hardly think the suggestion is entitled to serious consideration. The land of these heirs was assumed to be sold by one who in no way represented them, and over whom they had no control, either in the disposition of the \$500 or otherwise. They were not parties to the administration proceedings. The parties to the settlement of the administrator's accounts were the administrator and the estate which he represented, and the only questions involved in it were as to the receipts and disbursements of the former. We can conceive of no principle of law by which the heirs can be held estopped from claiming their own land by reason of an act to which they were not parties, and over which they had no control, merely because it may have resulted in some indirect benefit being thrust upon them which they had no power to reject.

Judgment reversed.

FRANKLIN J. SCHREIBER vs. GERMAN-AMERICAN HAIL INSURANCE COMPANY.

June 2, 1890.

Insurance on Growing Crops—Condition Avoiding Policy.—A condition in a policy of insurance that, in case any of the representations or statements in the application are untrue, the policy shall be null and void, does not make the policy absolutely void, but void only at the election of the insurer.

43	367
52	431
43	367
64	99

Same—Effect of Election to Avoid.—In case of election to avoid the policy, it becomes void *in toto* and from the beginning, so that the insurer cannot avoid it and enforce the promise of the insured to pay the premium.

Same—Waiver of Right to Avoid.—After a loss on a policy with that condition, the insurer brought suit against the insured on the premium note, took judgment, and collected it by execution. *Held* that, although thus enforcing payment of the note, if done without notice of the breach of condition, would not be a waiver of its right to avoid the policy, yet the retention, after notice of the breach, of the money thus collected, would be a waiver. After learning of the breach the insurer could not elect to avoid the policy without returning, or offering to return, the money so collected.

Same—Construction—Two Concurrent Policies Construed Together.—

Two applications for insurance of crops—one upon 40 acres of barley in the north half of section 28, etc., and one upon 120 acres of oats in the same half-section—were made at the same time, by the same person, to defendant; and two policies thereupon were issued by defendant at the same time. In the body of each policy, in print, coming after the description of the land,—partly in print and partly in writing,—was a clause that would limit the number of acres specified to a strip next to and along the northerly line of the section, of sufficient width to make the specified number of acres. There was no such clause in either application. Reading the two policies together, and giving effect to that clause in each, they assume to insure 120 acres of oats covering a strip 60 rods wide, along and next to the north line of the section, and 40 acres of barley within the strip covered by the oats. *Held*, that to determine whether the clause is operative in either policy, the court will read the two applications and the two policies together, and, as the retention of

the clause leads to an unreasonable and absurd result, and makes the descriptions inconsistent, it must be rejected from each policy.

Same—Appraisement without Notice to Insured.—According to the terms of the policies, if the insured and the agent of the insurer present to adjust a loss should be unable to agree, the former was to deposit with the agent \$10 to pay the expenses of an appraisement of the loss, and the agent was thereupon to appoint three appraisers, who should immediately repair to the field where the loss occurred, and appraise the loss or damage. *Held*, that an appraisement without notice to the insured of the appointment of appraisers, and of the time when they were to make the examination, was void.

Affidavit of President held Evidence against Company.—An affidavit of the president of the defendant, made to procure a continuance in this action for the absence of a witness, is competent evidence against this defendant that the witness was agent of the defendant, and had authority from it as stated in the affidavit.

Appeal by defendant from an order of the district court for Clay county, refusing a new trial after a trial before *Mills, J.*, and verdict of \$3,876.15 for plaintiff.

John B. & W. H. Sanborn, for appellant.

R. R. Briggs, for respondent.

GILFILLAN, C. J. This is an action upon three policies insuring growing crops against loss or damage by hail. Each policy contained a condition that, in case any of the representations or statements made in the written application are untrue, "this policy shall be null and void." Under this condition, one defence alleged is that the application represented that the land was free from incumbrances, whereas it was subject to mortgages and liens. The policies issued June 29, 1881. The loss or damage occurred September 4, 1881. In February following the defendant took judgment against the insured upon the unpaid premium notes, all of which fell due October 1, 1881. Execution was issued upon it, and it was paid.

The condition we have stated did not make the policies absolutely void. They were void at the election of the defendant, which might waive the breach of the condition. If it chose to waive it, the insured could not avoid the premium notes by reason of the breach. In a case similar to this, the court, in *Huntly v. Perry*, 38

Barb. 569, an action upon a premium note, said that the insured shall not be permitted to set up his own misrepresentation as a defence when the company are asserting the validity of the policy, and seeking to enforce the consideration he agreed to pay for it.

But if the defendant, under this condition, elect to avoid the policy, it must avoid it *in toto*, and from the beginning. It could not affirm it for part of the time, or for one purpose, and avoid it for the remainder of the time, or for another purpose. If avoided, the consideration for the premium notes would fail. Where there is a stipulation in the policy that, in case it is void as an insurance for violation of such a condition, the insurer may retain the paid-up premium, it may be the insurer can so retain it notwithstanding he elects to avoid the policy. But he cannot avoid it and enforce the promises by the insured in consideration of the insurance. A stipulation that, in case the policy shall become void as an insurance from the time of the happening of a particular event, the whole premium paid or unpaid for the entire term shall be deemed earned, gives the insurer the right to collect the unpaid premium; for the benefit of insurance which the insured has to the time of the specified event is a sufficient consideration for the promise to pay the premium. There is no consideration for such promise where the insured gets no benefit of insurance.

To make any act of the insurer a waiver of the breach of a condition for which he may elect to treat the policy as void, it must be with notice of the breach. As it does not appear that this defendant had notice of the breach alleged when it enforced payment of the premium notes, that did not constitute a waiver. But the action to enforce the notes could proceed only on the theory that the policy was valid. It was a solemn assertion of its validity. And, having by that means compelled the insured to fully perform the contract on his part, it certainly seems unjust that it should retain what it thus compelled the insured to pay, and be permitted to escape the obligations of the contract on its part. After it learned that it might elect to avoid the policy, honesty required that, before so electing, it should restore the money, payment of which was thus exacted. The retention of that money was—in morals, certainly—inconsistent with an intention to

avoid the policy. We find no case exactly like this. There are some which seem to intimate that before electing to wholly avoid the policy the insurer must return the premium even voluntarily paid. *Fishback v. Phoenix Ins. Co.*, 54 Cal. 422, 427; *Harris v. Equitable Life Ass. Society*, 64 N. Y. 196; *Home Mut. Life Assn. v. Riel*, (Pa.) 17 Atl. Rep. 36. Without expressing any opinion of what is said in those cases, we do not hesitate to hold in this case that the defendant could not retain the premium thus collected, and also avoid the policy; that, under the circumstances, it was defendant's duty, as soon as it learned of the breach of condition, to determine whether it would abide by the policy and retain the premiums, or restore them and elect to avoid it. It has never returned nor offered to return the premiums, and by retaining them must be deemed to have elected to abide by the policy.

The decision of this point renders it unnecessary to consider points 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, and 21, in appellant's brief. There is nothing requiring special mention in points 1, 2, 3, 7, 8, and 18. We see no error in the matters they point out.

One matter of defence is that two of the crops claimed to be insured, to wit, 120 acres of oats and 40 acres of barley, under two of the policies, were not upon the lands described in the policies. It appeared from the testimony that these crops were on the south half of the north half of section 28; the 120 acres of oats being the southerly 120 acres of the south half, and the 40 acres of barley being the 40 acres next north of the 120,—the two together taking up the whole south half. The applications for the policies were made at the same time, and the policies issued at the same time. The application for the policy on the barley described the land, "Acres, 40, all situated in the north half of section 28," etc. That for the policy on the oats described it as "Acres, 120, all situated in the north half of section 28," etc. In each of the policies was this provision: "That the description of the land, the crops on which are hereby insured, is the same as the assured has given in his application; and that the tract of land on which the respective crops are situated is a tract of land extending along the entire northerly line of the portion of the section last above described, of uniform and sufficient width

to constitute the number of acres above named, for insurance upon which this application is made; and that, unless the assured have otherwise clearly described the tracts and acres named, it is agreed that this shall be taken and held to be the description of the land on which the insured crops stand in the issuance of the policy, and the adjustment of the loss, if any, that may occur, whether in fact there are any crops on such northerly portion or not." This was in print, in the body of the policy, after the description of the land, which was partly in print and partly in writing. The application contained no such provision. If this provision applies to the policies, then there can be no recovery either for the oats or the barley. Ordinarily, such a provision in the policy, in the case of a single policy, with no more specific description in the application and policy than by giving the number of acres in a specified subdivision, would limit and control the description. In determining whether in this case the parties are to be deemed as intending and understanding the clause to have that effect, we must take into account that there were two applications made at the same time, and two policies issued at the same time; and if in each policy the clause is operative, then, taking the two policies together, we have this singular result: that the defendant intended to insure 40 acres of barley, taken in a strip 20 rods wide along the north line of the section, and 120 acres of oats in a strip 60 rods wide along the sameline; the 120 acres of oats including the 40 acres of barley. It would be an absurd and unreasonable intention. There is no way to avoid attributing it to the parties but by holding that they did not intend the clause to be operative. It is inconsistent with the clear intent of the policies. If not operative, then, according to the descriptions in the applications and policies, there was insured 120 acres of oats and 40 of barley in the north half of the section, in whichever part of that half they might be situated; and this we consider to be the effect of the policies.

The by-laws of defendant were made part of the policies by their express terms. As to the mode of ascertaining the amount of losses, the by-laws provided that the agent or officer of the company present to adjust, and the insured, shall endeavor to agree upon the

amount of the loss, and if they are unable to agree the insured shall deposit with such agent or officer \$10 in cash to pay the expenses of an appraisement; and the said agent or officer shall thereupon appoint three disinterested persons. The three so appointed shall immediately repair to the field where the damage or loss occurred. They then provide how the three persons shall proceed. There was evidence that the defendant appointed three appraisers, who, as to two of the policies, appraised the damages at nothing. It is claimed that this appraisal bars a recovery upon those two policies. While we might be obliged to sustain so peculiar a provision for ascertaining the damages as these by-laws contain, it certainly could not be favored. It practically put the whole thing, in case the parties do not agree on the damages, in the hands of the company. Such a provision must be strictly construed. It contemplates that the appointment of appraisers shall be made at once upon a disagreement, and in the presence of the insured, or at least with notice to him of the appointment, and of the time when the appraisers are to make their examination. From the evidence the jury might have found that the appointment and appraisal were without the knowledge of the insured, and if they did so find the appraisal was not binding.

There was competent and sufficient evidence in the affidavit of the defendant's president, made in its behalf in this action, that Allen was its adjuster of losses. It was therefore proper to prove what passed between plaintiff and him.

Order affirmed.

STATE OF MINNESOTA vs. JOHN N. PRIESTER.

June 2, 1890.

Municipal Corporation—Charter—Passage of Ordinances.—A clause in the charter of the city of Minneapolis providing that no ordinance shall be passed at the same session at which it is introduced, except by the unanimous consent of all the members of the council present, *held* not to require a unanimous vote upon the final passage of the ordinance, but only unanimous consent that it be put to a vote for its passage.

Same—Ordinance—Sale of Liquor without License.—An ordinance prohibiting sales of liquor without license, the ordinance not specifying any quantities, is valid,—certainly as to sales in quantities less than five gallons.

Same—Who may Question Validity of Ordinance.—One proceeded against for selling a quantity less than five gallons cannot question the validity of the ordinance so far as it may apply to sales in quantities of five gallons and upwards.

Evidence—Sale of Liquor—Order by Telephone.—To prove a sale by defendant, it is proper to prove that an order was sent by the purchaser, by telephone, to the establishment of which the defendant was in charge, and that the article was accordingly sent to the purchaser.

Defendant was tried and convicted in the municipal court of Minneapolis on a complaint for selling one case of beer, containing 24 pints, without first having obtained a license therefor, and in violation of the ordinance mentioned in the opinion. He appeals from the judgment.

Thomas Canty, for appellant.

L. A. Dunn and *Albert H. Hall*, for respondent.

GILFILLAN, C. J. The charter of the city of Minneapolis (Sp. Laws 1881, c. 76, *subc.* 4, § 9, p. 439, as amended by Sp. Laws 1885, c. 2, § 15,) contains this provision: "No ordinance shall be passed at the same session, nor at any session occurring less than one week after the session in which it shall have had its first reading, of the council at which it shall have been presented, except by the unanimous consent of all the members present, which shall be noted in the record;

but this shall not preclude the passage of ordinances reported by any committee of the council to whom the subject of such ordinance shall have been referred at any previous session." The question raised on this appeal is, does it require that in the case specified the ordinance must have a unanimous vote in its favor, or does it require merely unanimous consent that it may be read the last time, and put to a vote for its final passage? The section from which we have quoted also provides: "All ordinances and resolutions of the city council shall be passed by an affirmative vote of a majority of all the members of the city council, by ayes and nays, which shall be entered in the records of the council."

We think the purpose of the part of the section first quoted is the same as that of the clause in the constitution requiring bills before the legislature to be read on three different days, unless two-thirds of the house before which they are pending shall deem it expedient to dispense with that rule. It is to prevent over-hasty passage of ordinances, and to secure to the aldermen who may desire to consider a proposed ordinance before being called on to vote upon its passage an opportunity to examine it. In other words, it is to prevent an ordinance being introduced and forced to vote on its passage without giving the members of the council time to be prepared to vote intelligently. Whether they are so prepared, it is, of course, for the members to determine; and, if there is one who feels himself unprepared to vote on the ordinance at the meeting at which it is introduced, his right to time to consider the matter is secured by the power given him to dissent to a proposal to proceed to a vote on its passage at that meeting.

The ordinance for breach of which the defendant was convicted prohibited the sale of spirituous, vinous, fermented, or malt liquor without a license. It does not specify any quantity, but by its terms applies to all sales, in large or small quantities. The defendant urges that, as by its terms it prohibits sales in quantities of five gallons and upwards, and as, by the laws of the state, persons without license may sell in such quantities, the ordinance is in conflict with the general legislative policy of the state, and is therefore void. But, although it be conceded that the ordinance is void so far as it pro-

hibits sales of five gallons and upwards, it does not follow that it is so as applied to sales in smaller quantities. An ordinance may be void so far as it exceeds the authority conferred on the common council, and be good for what is within its authority, where the excess of the act of the council is severable from what it has authority to do. The defendant was charged with selling less than five gallons; and, the ordinance being valid as to such a sale, he cannot raise the question whether it would be void so far as it might be construed to prohibit a sale of the larger quantity. It is not necessary for us, therefore, to decide the proposition he makes.

The evidence was sufficient to sustain the verdict.

There is nothing in the other assignments of error. It was proper to prove that the order was sent by the purchaser, by telephone, to the establishment of which defendant was in charge, and that the beer ordered was sent to the purchaser accordingly.

Judgment affirmed.

HENRY CARNER vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

June 2, 1890.

Entry under Timber-Culture Act—Ownership of Hay made on Land.—

One who enters land under the act of congress known as the "Timber-Culture Act," and who has complied with its conditions, is, during the term required to perfect his right to a patent, the owner of hay made from the grass which he cuts on the land.

Same—Recovery for Destruction of Standing Trees—Damages.—He

may recover from a wrong-doer who destroys trees standing on the land their value as standing trees; that is, the value they add to the value of the land.

Same—Evidence.—To prove such value, it is proper to prove the value of the land with the trees standing on it, and its value with the trees destroyed.

Same—Subsequent Surrender of Claim.—The fact that, after the destruction of the trees, he surrendered his claim, does not affect his right to recover.

43	375
45	90
43	375
46	372
43	375
64	73

Appeal by defendant from an order of the district court for Rock county, *Perkins, J.*, presiding, refusing a new trial after verdict of \$360 for plaintiff.

J. H. Howe, S. L. Perrin, and Daniel Rohrer, for appellant.

P. E. Brown, for respondent.

GILFILLAN, C. J. The action is for damages caused to property by the negligence of the defendant in running its trains, in consequence of which the property was destroyed. That the finding of defendant's negligence was supported by the evidence is conceded. Whether plaintiff is entitled to recover, and, if so, what measure of damages, are the main questions to be decided. May 22, 1876, the plaintiff entered at the proper land-office 80 acres of land, under the act of congress of March 13, 1874, (18 U. S. St. at Large, 21,) entitled "An act to amend an act to encourage the growth of timber on western prairies," and up to the time of the injury complained of had held said entry, and complied with the provisions of the act. The injury consisted in setting fire to and destroying trees planted by plaintiff under his entry, and standing on, and hay which he had cut from, the 80 acres, and remaining on it. The defendant contends that, as the title to the land was in the United States, it was the owner of the trees, and of the grass from which the hay was made, and therefore the plaintiff cannot recover for injury to them. Plaintiff was not in wrongful possession of the land, as was the case in *Lindsay v. Winona & St. Peter R. Co.*, 29 Minn. 411, (13 N. W. Rep. 191.) By his entry and compliance with the terms of the act he had acquired vested rights, even as against the United States. We held that in *Red River, etc., R. Co. v. Sture*, 32 Minn. 95, (20 N. W. Rep. 229,) in respect to one entering lands under the homestead acts of congress. The rights under the homestead acts, though differently acquired, are no greater than those under the timber-culture act. Under the latter act, the party entering has the right to occupy and cultivate the land, and owns the annual crops which he harvests, whether of grass not sown by him or of grains. As against the United States, he may not have a right to cut the trees for removal and sale, or for any purpose other than the proper cultivation of the land. His rights are analogous to those of one in under a contract

to purchase, in which case the vendor might ordinarily, unless the contract provided otherwise, prevent the commission of waste. But, as against third persons, he is the owner. It is true the party entering the land may forfeit his rights to the United States by failure to perform, until the end of the eight years, the requirements of the act. But certainly, until such forfeiture, he has a right of redress for any injury to his property in the land.

For destruction of the hay, of course, the measure of damages was its value. And we see no other practicable measure of damages for destruction of the trees than their value as standing trees; that is, the value they added to the land. One way of getting at that was to ascertain the difference in the value of the land with the trees standing upon it and its value with them destroyed. It was competent, therefore, for the court to admit proof of the value of the land just before the trees were destroyed, and of its value just after.

Defendant further contends that plaintiff cannot recover because, some time after the injury complained of, he surrendered to the United States all his right, title, and interest in the land. We cannot see how that could affect his right of action already accrued.

The court refused to instruct the jury, at the request of the defendant, that "if the jury find from the evidence that either Carner or his servant or employe saw this fire, and saw that it endangered the trees and hay, and had reasonable time to make an attempt to avert the destruction, and failed so to do, and such failure contributed to the loss, then the plaintiff cannot recover in this action." It does not appear that there was evidence to which this could properly apply. Plaintiff was absent at the time of the fire, and it was not shown that he had any servant or employe in charge of or whose duty it was to guard the 80 acres, so that his negligence could be claimed to be the negligence of the plaintiff. Defendant objected on the trial to the reading of a deposition of one John Carner, who at the time of taking it resided within the state, and which was taken within the state. It was taken under Gen. St. 1878, c. 73, § 36, as amended by Laws 1885, c. 53. Objection is made that if chapter 53 was intended to amend the prior law, it is unconstitutional. The grounds upon which this objection are based are too fine to be appreciated.

We see nothing in the objection. Another ground of objection to the deposition was that it did not appear that the witness was at the time of the trial out of the jurisdiction of the court. We think the evidence was such as to justify the court in deciding that the witness was out of the jurisdiction.

Order affirmed.

STATE OF MINNESOTA *vs.* JOHN H. COLWELL.

June 2, 1890.

Larceny of Several Articles—Effect of General Verdict.—A general verdict of "guilty" convicts a defendant of all that the indictment well alleges against him. Hence, where the charge is of larceny of several articles of values specified, such a verdict is a finding that the defendant stole every one of them, and that their several values were as averred.

Evidence *held* sufficient to justify the verdict.

Appeal by defendant from a judgment of the district court for Hennepin county, where he was tried before *Hooker, J.*, and a jury on an indictment for grand larceny.

R. B. Forrest, for appellant.

Moses E. Clapp, Attorney General, and *G. H. Wyman*, for the State.

MITCHELL, J. The defendant was indicted for grand larceny in the second degree of a number of articles of personal property of values specified. The jury found a general verdict of "guilty," upon which the court pronounced sentence, in accordance with the statute, (Laws 1887, c. 208,) that the defendant be imprisoned in the Minnesota State Reformatory at St. Cloud.

1. The point is made that the verdict should have found the value of the property. It can hardly be necessary to refer to the elementary proposition that a general finding of guilty convicts a defendant of all that the indictment well alleges against him, and hence that, where the charge is of the larceny of several articles of value specified, a verdict of "guilty" affirms equally that the defendant stole

every one of them, and that their several values were as averred. That there is nothing inconsistent with this in *State v. Coon*, 18 Minn. 464, (518,) relied on by counsel, will be apparent from an examination of the facts of that case.

2. It is also urged that no proper judgment was entered against the defendant. If by this is meant that the sentence itself, which is the judgment of the law upon the verdict, should recite all the various steps, from the finding of the indictment down to the verdict, of course there is nothing in the point. If, however, it means that the clerk of the court has failed after sentence to make up a proper judgment-roll, as required by Gen. St. c. 118, § 1, it is sufficient to say that the record fails to show it.

3. The only other assignments of error which counsel urged upon the argument may all be summed up in one, viz., that the verdict was not justified by the evidence. A careful perusal of the case satisfies us that the evidence was amply sufficient to justify a verdict of guilty. While it is true, as counsel claims, that inferences are to be drawn from the evidence, and not against it, yet a jury is not confined to any particular theory of the case in considering the evidence, nor bound to either accept or reject the entire testimony of a witness. There was abundant evidence, circumstantial as well as direct, to warrant the jury in concluding that the witness Brady and defendant entered into a criminal conspiracy to run off with these goods, and fraudulently deprive the owner of them by appropriating them to their own use. And if this was so, the fact that in the execution of this criminal purpose Brady might have assumed, without authority from the owner, to sell, and defendant to buy, a part of the goods, would not constitute an appropriation by defendant under claim of title preferred in good faith. The circumstances surrounding this alleged sale by Brady to defendant (assuming that it took place) were so suspicious that certainly the good faith of the transaction was a question for the jury.

The other assignments of error were not urged on the argument, and an examination of them shows that they have no substantial basis.

Judgment affirmed, and stay of execution vacated.

ST. CLOUD WATER-POWER & MILL COMPANY *vs.* MISSISSIPPI & RUM
RIVER BOOM COMPANY.

June 2, 1890.

Dam—Precautions against Injury from Logs.—Under the authority given plaintiff by act of congress to construct a dam across the Mississippi river at St. Cloud, it is for the plaintiff to do what is necessary to protect its dam from the consequences of jams of logs floating down the river, caused by the slack-water which the dam creates. If to prevent such jams, and protect the dam against the consequences of them, it be necessary to employ men to get the logs past the slack-water, it is for plaintiff to employ them.

Appeal by plaintiff from a judgment of the district court for Stearns county, where the action (brought to recover \$618 damages for injuries to plaintiff's dam) was tried by *Baxter, J.*, a jury being waived.

Reynolds & Stewart, for appellant.

Jackson & Atwater, for respondent.

GILFILLAN, C. J. The plaintiff is a corporation under the laws of this state, authorized by various acts of the legislature to construct a dam across the Mississippi river at St. Cloud. The consent of congress to the construction of such dam was given by chapter 231, Acts Cong. 1883-84, (23 U. S. St. at Large, 154.) The act granting such consent contains this proviso: "*Provided, further, that the works be constructed so as to provide for the free passage of saw-logs and rafts, and, when necessary, to permit the passage of boats.*" There can be no question of the power of the legislature, with the sanction of congress, to authorize the construction of a dam across the river, although it is a navigable stream; nor of the power, especially of congress, to impose upon the right granted such restrictions and conditions, as to the kind of dam and manner of construction, as might be deemed best to protect the interest of those engaged in navigating the river, in floating logs or otherwise. The plaintiff was bound, therefore, if it constructed the dam, to so construct it as to provide for the free passage of saw-logs and rafts. The provision

for that purpose made by plaintiff in its dam was a deep sluiceway, 88 feet wide, "of sufficient size and capacity to float all logs that come down the river through the same, when, and only when, such logs are properly managed and attended to;" and sheer-booms above and leading to the sluiceway, of sufficient strength and capacity to guide safely all logs coming down the river into and through the sluiceway, when such logs are properly attended and managed; that one or two competent persons would be necessary and sufficient for that purpose. Unless so managed and cared for, they will collect in large numbers, and pile one upon another, causing a jam in the slow current above and caused by the dam; and when so collected the booms are not strong enough to resist the pressure of the logs against them, and by reason thereof the logs would break the booms, spread out over the river, and run over the dam at places other than the sluiceway. The defendant is a corporation authorized by acts of the legislature to take control of and float down the river all logs coming down the river between Brainerd and Minneapolis. In 1888 logs in its control came down the river, and by reason of not being properly managed and cared for, by not having enough men stationed at the sheer-booms and sluiceway to keep them moving down between the booms and in the sluiceway, a jam was formed, which broke the booms, and the logs spread out over the river, and floated over the dam at other places than the sluiceway, and injured the dam. The action is to recover for so injuring it. The foregoing facts are stated from the findings of fact made by the court below.

We understand the proper care and management, and the necessity of having one or two men employed for that purpose, mentioned in the findings, to refer, not to the matter of floating logs down the river generally, but to the necessity created by the presence of the dam, and the slack-water caused by it; in other words, that it is necessary to have one or two competent men in attendance to get the logs past the slack-water, and so avoid jams and the breaking of the booms. The question in the case is, whose duty is it (plaintiff's or defendant's) to provide the care and management necessary to protect plaintiff's property from the danger caused by the effect of the slack-water which the dam creates? We cannot avoid the conclu-

sion that it is the plaintiff's, it having lawful authority to construct the dam, providing "for the free passage of saw-logs and rafts." Whatever inconvenience may necessarily arise from the presence of the dam, constructed as prescribed, to those floating logs down the river, they must submit to. That, it must be presumed, was in the mind of congress in passing the act referred to. This is the only additional burden imposed on them. If the dam and the means provided to secure free passage of saw-logs and rafts render precautions necessary to protect the dam and plaintiff's property, it is for it to take such precautions. When it has taken reasonable precautions, if, notwithstanding such, the dam should be injured by negligence in the manner of floating logs or rafts to or over it, those guilty of such negligence would be liable. That is not this case. The only neglect charged is in not providing men to overcome the effect of the slack-water caused by the dam and the means provided to allow the free passage of logs and rafts.

Judgment affirmed.

PHILANDER T. SHEPARD *vs.* ROBERT SHERIN.

June 2, 1890.

Agent—Liability for Money Paid to him by Mistake.—An agent to whom money is paid for his principal by mistake is not liable to the party paying it, if he has paid it over to the principal before notice of the mistake and that he is required not to pay it over.

Same—Notice to Agent not to Pay Over.—The notice need not be formal, but it must apprise him of the mistake, and that the party intends by reason of it to reclaim the money.

Same—Who may Give Notice.—One having no interest nor authority in the matter cannot give such notice.

Action to recover \$130.52, brought in the district court for Faribault county, and tried without a jury by *Severance, J.* Judgment was ordered for defendant, who appeals from an order granting a new trial.

Benj. G. Reynolds, for appellant.

Lorin Cray and *J. L. Washburn*, for respondent.

GILFILLAN, C. J.¹ On the evidence, there could be no question of the main facts in the case, especially that the overpayment was merely through mistake of fact, and not through any fraud or fault on the part of defendant; that he received it expressly for his principal, R. W. Sherin, and had paid the money over to him the same day. These facts were found by the court below; and on the motion for a new trial the court, as appears from its memorandum filed, had no doubt of the propriety of those findings. But the court also found as a fact that the defendant so paid over the money without notice of any mistake; and, because it thought this finding was not justified by the evidence, it ordered a new trial. The evidence as to notice would not have justified any finding of notice to defendant that would have changed the proper result of the action. The law regulating the liability of an agent to the party paying it, for money paid to him for his principal through mistake, is well settled. We find it as well stated as anywhere in *Elliott v. Swartwout*, 10 Pet. 137: "When the money is paid voluntarily and by mistake to an agent, and he has paid it over to his principal, he cannot be made personally responsible; but if, before paying it over, he is apprised of the mistake, and required not to pay it over, he is personally liable." See, also, *Buller v. Harrison*, 1 Cowp. 565; *Hearsey v. Pruyn*, 7 John. 179; *La Farge v. Kneeland*, 7 Cow. 456; *Mowatt v. McLelan*, 1 Wend. 173.

The notice of the mistake, and requirement not to pay to the principal, need not be formal. The rule that, if he pays over without notice, he is not liable, is for the agent's protection; and, to deprive him of the protection, the notice to him should be sufficient to apprise him what the mistake is, and that by reason of it the party paying it to him intends to reclaim it.

The only notice of which there was any evidence came about in this way: The principal held the note and mortgage of one Burrows. The latter had arranged for a loan from plaintiff, and, as a part of the money to be loaned, the latter was to pay off the note and

¹Vanderburgh, J., took no part in this case.

mortgage. The principal had authorized defendant to receive a specified sum as due on the note and mortgage, and on receiving it to deliver a satisfaction-piece executed by the principal. The sum specified was paid to him, and he delivered the satisfaction. The mistake claimed was in the amount due. Burrows testified that after the payment "I went out and saw Sherin. I told him I thought they had made a mistake. They had figured the note too much. He said he had got to go to the train, and said, if there was anything wrong, my son [the principal] would make it right." This was all the evidence of notice. Had such notice been given by the plaintiff, it would have been hardly sufficient; for it would not have apprised defendant that he intended to reclaim whatever might have been overpaid. But it was by one who had no authority in the matter. According to the arrangement between plaintiff and Burrows, the former could charge the latter with only what was actually due on the note and mortgage, and paid by him. In what was overpaid, plaintiff, and not Burrows, was solely interested. As relates to notice that could affect the rights of the parties, the finding of the court that there was none was the only finding that, on the evidence, could be made.

The respondent points out various rulings on the trial which he claims to be erroneous, and sufficient to justify an order granting a new trial. They have no bearing on the matter of notice, the point as to which plaintiff's case failed, and therefore they could not prejudice him.

Order reversed.

DICKINSON, J. I concur in this decision upon the ground that the evidence did not show any such notice by Burrows as to affect the duty or conduct of the defendant in his agency. I, however, think that, upon the facts as found by the trial court, Burrows might have given such notice as would have enabled him to maintain an action to recover the surplus.

STATE OF MINNESOTA *vs.* AUGUST PLYM.43 385
45 161

June 2, 1890.

Bigamy—Evidence—Defendant's Admissions.—On a trial for bigamy, the fact that the defendant, when expostulated with in regard to his second marriage, at or about the time of its occurrence, on the ground that his former wife was still living, was silent and did not deny the fact, is competent evidence against him as being in the nature of an admission.

Same—Nature of Presumption of Continuance of Life.—The presumption that a person is still living, arising from the fact that he was alive at a former date, is one not of law but of fact, of varying strength, according to circumstances. The fact that he was alive at a particular time is but one of the facts to be considered in determining whether he was alive at a given future date, the probative force of which will depend upon accompanying circumstances, such as the length of intervening time, the age and health of the person, or any other facts affecting the probability of the continuance of his life.

Same—Weight of such Presumption.—Its weight as evidence is a question for the jury, to be determined by the general presumption or probability of the continuance of the life, in view of all the circumstances of the case. It may be sufficient to warrant them in finding that the person was still alive at a given future date, although there is no direct evidence of the fact.

Appeal by defendant from an order of the district court for Ramsey county, Brill, J., presiding, refusing a new trial.

Williams & Schoonmaker, for appellant.

Moses E. Clapp, Attorney General, and *James J. Egan*, for the State.

MITCHELL, J.¹ The defendant was indicted, tried, and convicted of the crime of bigamy. The case comes here on a bill of exceptions which does not purport to contain all the evidence. The rulings of court in admitting certain evidence, and in certain parts of its charge to the jury, are here assigned as error. The state introduced evidence sufficient to prove the defendant's first marriage, in Sweden,

¹Vanderburgh, J., was absent and took no part in this case.
v.48m.—25

in July, 1876, and his second marriage, in St. Paul, on the 10th of January, 1889. The uncontroverted evidence was that the defendant left Sweden and came to the United States in April, 1884, leaving his first wife, then living, and her children, in Sweden; also, that when a sister of defendant left Sweden on the 29th of August, 1887, to come to St. Paul, where her brother lived, the first wife was still living in Sweden, and sent by her a letter and message to her husband, to the effect that she wanted to come over to him, and that when this message was communicated to him, he said that "he would take her over after a while." The evidence the reception of which is assigned as error was the testimony of his brother and sister, to the effect that immediately before and after his second marriage they expostulated with him in regard to it, saying that it was not right to get married when he had a wife and children in Sweden, etc., and that he did not make any answer, except to say that it was his own business, and was nothing to them, and that they need not bother themselves about it. This evidence was competent. His silence, in the face of a charge that his wife was still living, was in the nature of an admission of the fact,—certainly of the fact that he supposed she was living.

The charge of the court assigned as error was as follows: "There is a presumption that a person living at a certain time continues to live until the contrary appears; that is, when the life is once shown, it is presumed to continue until it shown to have ended. That presumption may be stronger or weaker according to the circumstances of any particular case. It is not a conclusive presumption, but it is a presumption which the jury is warranted in drawing from the fact of life being shown that life continues until it otherwise appears." The court, however, explicitly charged the jury that the defendant was presumed to be innocent until his guilt was established beyond reasonable doubt, and that his guilt, and all the facts necessary to convict him of the crime, must be established beyond a reasonable doubt; and that among the facts of which the jury must be convinced beyond reasonable doubt, in order to convict, was the fact that his first wife was living at the time of his second marriage. The jury were also instructed that they were to take all the circumstances into consideration in determin-

ing the case, and that they were the judges of the facts. Taken as a whole, we find no error in this statement of the law. There is some confusion, if not conflict, of views in the decisions in cases of conflicting presumptions of the continuance of life and of innocence, as to which shall prevail. Some hold that what is called the presumption of the continuance of life must yield to the stronger presumption of innocence; and therefore, in prosecutions for bigamy, the fact that the former husband or wife was living at some particular date before the second marriage will not warrant a conviction; that there must be some direct evidence that he or she was still living at the date of the second marriage. Reduced to its logical result, the effect of this would be that, if it was proved by the most indisputable evidence that the former husband or wife was alive and in good health a few hours before the second marriage, the jury could not presume that death had not intervened, without some direct evidence to the contrary. The unreasonableness of this as a practical rule of evidence would seem almost self-evident. Other cases, apparently upon the idea that the presumption of the continuance of life is one of law, seem to imply, if not hold, that if the life is proved still to exist at any time within the statutory period of seven years, it must, as a matter of law, be presumed still to continue until there is some direct evidence tending to prove that it has terminated.

It seems to us that neither of these views is correct. The statutory presumption, in certain cases, of death after seven years affords no ground for the converse proposition that, if the person has been heard from within seven years, there is a presumption of law that he is still living. Neither is it true that there is any presumption of law one way or the other as to the continuance of life. It is a mere presumption of fact, which is subject to be controlled by facts and circumstances, and consequently by no means of equal strength at all times, and under all circumstances; or, perhaps, more correctly speaking, there is no rigid presumption one way or the other. The evidence that a person was living at a particular time is but one of the facts to be considered in determining the question whether he was living at any future given time, and which is to be considered with

reference to accompanying circumstances, such as the length of time intervening, the age and health of the person, and the like. Its weight as evidence will be affected by any circumstances affecting the probability of the continuance of the life, or rendering it probable that death had occurred. If the lapse of time was comparatively short, it would, in ordinary cases, in the absence of any evidence to the contrary, be usually deemed satisfactory. But the question whether a person was alive at a certain time, whether a day, a month, a year, or any other period less than seven years after direct evidence of his being alive, is a question of fact for the jury, to be determined by the general presumption—or probability, if the latter term is preferred—of the continuance of human life in view of all the circumstances of the particular case.

It is usual to say, as did the trial judge in this case, that if a person is proved to have been alive at a given time, less than seven years before, there is a presumption, more or less strong according to circumstances, that he is still living, unless the contrary appears. This is but another way of saying, what would perhaps be a more precise statement of the proposition, that it is a fact from which the existence of the other fact may be inferred or deemed proved. This is, we think, in effect what the court's charge, when considered as a whole, amounted to. As the record does not purport to contain all the evidence, we do not know what, if any, facts or circumstances were shown bearing upon the probability of the continuance of the life of the former wife, or indeed whether or not there was any direct evidence that she was living at the date of the second marriage.

It follows from what has been said that defendant's third request to charge was properly refused, and that it does not appear that there was any error in refusing the second. The first was fully covered by the general charge.

Order affirmed.

In the Matter of THEODORE SHOTWELL and others, Insolvents.**June 2, 1890.**

Insolvency — Fraudulent Concealment, etc., of Property — Intent of Debtor.—To constitute a fraudulent concealment, incumbering, or disposal of property by a debtor with intent to cheat and defraud his creditors, within the meaning of section 10 of the insolvent law of 1881, so as to entitle creditors to share in the assets without filing releases, the act must have been committed with an actual corrupt and dishonest intent to cheat and defraud creditors. The mere fact that the debtor may have retained and used property which he had no legal right to retain or use, and that the effect of such act may have been a fraud on creditors in the sense that it deprived them of the benefit of assets to which they were equally entitled, is not, in the absence of such corrupt and dishonest intent, sufficient to entitle the creditors to share in the assets of the debtor without filing releases.

Same—Fraudulent Intent not Found.—The finding of the court construed, and *held* not to amount to a finding of a fraudulent concealment or disposal of property with intent to cheat and defraud creditors, and hence insufficient to support the order appealed from.

Same—Refusal to Disclose—Dishonest Disclosure.—While a dishonest disclosure, or a refusal to make a full disclosure, by an insolvent debtor may justify the conclusion that he has fraudulently concealed or disposed of his property with intent to cheat and defraud his creditors, yet it is not the dishonest disclosure, or the refusal to disclose, but only the fraudulent concealment or disposition of his property, which is made the ground for permitting creditors to share in the assets without executing releases.

Appeal by the insolvents from an order of the district court for Hennepin county, *Lochren, J.*, presiding, directing a distribution of the estate among the creditors without the filing of releases.

Selden Bacon, for appellants.

Shaw & Cray, for respondents.

MITCHELL, J. In June, 1888, the appellants here executed, pursuant to the provisions of the "Insolvent Law," (Laws 1881, c. 148,) a general assignment of all their non-exempt property (both partnership and individual) for the benefit of their creditors. In January,

1889, one of the creditors of the firm, in behalf of itself and other creditors, seasonably petitioned the court to order, pursuant to section 10 of the act, that the property of the assignors be distributed among their creditors without their filing releases. The matter was referred to a referee to take and report the evidence, and from the evidence reported by him the court found the following facts: "(1) That the insolvents, just before making the assignment, and in contemplation thereof, by mutual agreement, each took the sum of \$600 of the partnership moneys then on hand, to be used by himself for his own anticipated personal needs, and caused the same to be charged against himself upon the books of the partnership, and has kept and used the same, and has turned over no part thereof to the assignee; that such taking was done with the knowledge of the book-keeper of the firm, and not secretly, *and with no other intent or purpose than to provide for the anticipated wants of said insolvents and their families immediately following such assignment, and until other means of subsistence could be attained or provided.* (2) That, upon the examination of the insolvents before the referee in this matter, divers questions were propounded to each of them by counsel for the petitioners, as to whether, upon a prior examination before the municipal court, he had not testified to certain matters concerning his participation in making an alleged statement to an agent of a commercial agency in January, 1888, concerning the then financial standing of the firm, representing that it then had assets to the extent of \$288,000 over and above all liabilities; that they and each of them refused to answer any and all such questions, acting therein upon the advice of their counsel." Upon these findings of fact the court made an order directing that the creditors be permitted to receive their respective dividends from the estate of the insolvents, without making or filing releases of their claims.

Much of the examination before the referee, and much of the argument of counsel here, has reference to the alleged discrepancy between the financial condition of the firm as shown by their statement in January, 1888, and as shown by the schedules to the assignment made in the following June; the petitioners claiming that the comparison showed a large amount of assets unaccounted for. As the

court has made no finding upon this, it is neither necessary nor proper for us to inquire whether the evidence was or was not sufficient to establish what petitioners claim for it. The order of the court below must stand or fall exclusively upon the findings as made.

The here material part of the insolvent law is section 10, which, after providing that only those creditors shall share in the estate of the debtor who have filed releases of their claims, contains the following: "*Provided, however, that when any creditor of such insolvent debtor * * * alleges, by complaint made to the judge, * * * that such insolvent debtor has fraudulently concealed or fraudulently incumbered or disposed of any of his property with the intent to cheat and defraud his creditors, such judge*" (after notice) "*may hear such legal evidence as he may deem pertinent, relating to such fraudulent concealment, incumbrance, or disposal; * * * and after such hearing said judge may, in his discretion, order or direct that all of said debtor's property and assets, not exempt by law, be distributed among his creditors, * * * upon their filing such releases, or without their filing releases as aforesaid.*" The language of the last part of this proviso is quite peculiar. But it certainly cannot mean that the judge shall hear evidence merely for amusement, and then decide the matter according to his own arbitrary caprice. What we think it must mean is that, if the petitioner's allegations against the debtor are proved, he shall grant the petition, otherwise deny it.

Two questions are therefore presented: (1) What constitutes a fraudulent concealment, incumbering, or disposal of property by the debtor, with intent to cheat and defraud his creditors, within the meaning of the statute? and (2) Do the facts stated in the first finding of the court constitute such a fraudulent concealment or disposal; or, otherwise stated, does the finding amount to a finding of such a fraudulent concealment or disposal?

In *Re Gazett*, 35 Minn. 532, (29 N. W. Rep. 347,) it was held that the words, "with intent to cheat and defraud," must be given the meaning ordinarily belonging to them, and therefore a mere preference of creditors by a debtor was not a fraudulent disposal of his property, within the meaning of the statute, although in violation of its policy, and the effect of it to deprive other creditors of their just

share of the debtor's estate. Again, in *Re Miller*, 42 Minn. 96, (43 N. W. Rep. 840,) it was held that the debtor's losing money in gambling in wheat options was not a fraudulent disposition of property with intent to cheat and defraud his creditors, within the meaning of section 10, because, although the act may have been morally wrong or even illegal, and the effect of it to waste the debtor's estate to the injury of his creditors, yet the act was not committed with the actual intention to cheat and defraud creditors, but for the purpose of making anticipated gains by the speculation; that the intention to cheat and defraud must be found to exist before an order can be made allowing creditors to participate in the debtor's estate without filing releases. And again, in *Re Welch*, *supra*, p. 7, it is said that the application of creditors should be denied, unless there has been a fraudulent concealment, disposal, or incumbering of property with intent to cheat and defraud creditors. It is true that this is but a repetition of the words of the statute, but the connection in which the statement was made indicates clearly the meaning which we then attached to them. These decisions at least imply, if they do not amount to an express holding, that the statute refers to actual fraud, as distinguished from fraud in law, and that, to bring an act of concealing or disposing of property within its purview, it must have been committed by the debtor with the actual intent and purpose of cheating and defrauding his creditors; that it is not enough that the act is illegal, and that the effect of it might be to deprive creditors of what they were entitled to, and hence operate as a constructive fraud upon them. And it seems to us that the language of the statute is too clear and explicit to admit of any other construction. Indeed, to hold otherwise would amount to rejecting and disregarding the last clause together. "Fraud," in its broadest sense, includes all acts or omissions which involve a breach of legal duty which are injurious to the rights of others; and, in contemplation of a court of equity, many acts constitute "fraud," in this broad sense of the word, which do not involve any actual intention to defraud. Many assignments for the benefit of creditors at common law, admitted to have been made without any actual dishonesty of purpose as against creditors, have been set aside on the ground of fraud; that

is, legal fraud. And under the late federal bankrupt act there were 10 different and distinct acts of omission or commission which were grounds for refusing the bankrupt his discharge, the law making or treating them as frauds upon creditors, although many of them did not necessarily involve either moral turpitude or actual dishonest intention. But our insolvent law recognizes but one ground for refusing a debtor his release, and that is actual fraud—*dolus malus*—committed by a fraudulent disposition of property, “with intent to cheat and defraud creditors.” So careful has the legislature been that it should not be extended by implication, that it has emphasized and repeated the language so that there might be no misunderstanding of its meaning. The word “intent,” referred to an act, denotes a state of mind with which the act is done, and the word “defraud” is to be understood in its natural and popular sense; and, that this word might not be misunderstood, there is coupled with it the word “cheat,” which, as popularly used, is still more pronounced in its significance. Hence it is not enough to bring an act within the statute that the disposition of property is unlawful or unauthorized, and that the effect of it is to defraud creditors, in the sense that it deprives them of what they are entitled to. A debtor might, through ignorance of the provisions of the exemption laws, and without any dishonest motive, retain property which in fact is not exempt. The effect of this would be a fraud on creditors. But it would hardly be contended that this would be a fraudulent concealment or disposition of property with intent to cheat and defraud creditors, within the meaning of this statute. It was never its intention to deprive an insolvent debtor of his release on any such grounds. See *Rugely v. Robinson*, 19 Ala. 404, 413. To bring a case within the statute, the act complained of must have been committed with the actual corrupt and dishonest design or purpose of cheating and defrauding. Of course, we do not wish to be understood that this corrupt and dishonest intention may not be inferred from the acts themselves.

Applying this construction of the statute to the case at hand, we think that the trial judge's first finding of fact is insufficient to support his order, for the reason that it neither in terms nor in equiva-

lents finds that this money was taken and used by the debtors "with intent to cheat and defraud their creditors." He does find that they took the \$600 apiece, and have used it, and have not turned it over to the assignee. That they intended to do what they did, viz., take the money, is, of course, self-evident; and it may be assumed for the purposes of this case that they had no legal right to do so, and that the effect of this was a legal fraud on creditors, in the sense that it deprived them of assets of their debtors to which they were entitled. But the judge not only omits to find that they did the act with intent to cheat and defraud their creditors, but he affirmatively finds that they took the money *with no other intent or purpose* than to provide for the anticipated wants of their families temporarily, and until other means for subsistence and livelihood could be provided. This finding, both in what it omits and what it contains, is peculiarly significant, coming, as it does, from a judge who never indulges in loose or inaccurate language, but who always knows exactly what he wishes to say, and thoroughly understands how to express it clearly, and without either addition or diminution. If he had intended to find the fact of an actual intention to cheat and defraud, he would have done so in no uncertain language.

It seems to us that the finding, and the order based upon it, proceed upon the theory that, if the insolvents intentionally took and retained the money, (as they did,) and if they had no legal right to do so, (as we shall assume they had not,) and consequently the creditors were deprived of what legally belonged to them, then the act amounted to a fraudulent disposition of property with intent to defraud and cheat their creditors, regardless of the actual intention or purpose of the debtor. We think the judge's memorandum, which we may take as the construction which he places upon his own language, supports us in this view. And while it is the sufficiency of the finding as made, and not what finding the evidence would have justified, with which we have now to do, yet we may fairly read this finding in the light of the evidence on which it is based as furnishing some aid in ascertaining what construction is to be put on its language, and the view of the law which the court adopted in framing it. The insolvents were large wholesale merchants, who had been doing a busi-

ness amounting to nearly a million and a half of dollars a year. They had partnership assets in the neighborhood of \$700,000, which they were about to assign and turn over for the benefit of their creditors. None of them had a homestead, and they had substantially no individual property, exempt or non-exempt, and no money. Each of them had a family dependent upon him, and they were without any means whatever, even of temporary support. In this condition of things, before executing the assignment, each of them took out of the firm \$600 for the temporary support of themselves and families until they could provide some other means of subsistence. They did it openly and not secretly, and charged themselves with the money on the firm books, where both creditors and assignee could see it. Within a few days, at least within a very short time, and so far as appears before they had spent the money, they informed some of the creditors, including the petitioner in these proceedings, of what they had done. The assignee also knew of the fact within some 10 days after the assignment was executed; and yet neither assignee nor creditor ever made any demand on them to return the money, or made any objection to their having taken it, until it was urged on this hearing as a ground for denying them the benefit of releases from participating creditors. While it is undoubtedly true that it would be just as unlawful for a debtor with large assets to fraudulently dispose of \$600 of his property as it would be in the case of one with small assets, and that the disposal of \$10 with intent to cheat and defraud creditors might be as good a ground for denying a debtor his discharge as if it was \$10,000, yet all these circumstances are relevant upon the question of the intent or motive with which the act was done; and in this case the evidence was certainly not so conclusive as necessarily to lead to the conclusion that there was an actual dishonest intent to cheat and defraud creditors, and evidently the learned judge did not feel justified in finding the existence of any such intent. The finding is not sufficient to sustain the order.

Little need be said as to the second finding, as it is clearly insufficient. While it is true, as held in *Re Rees*, 39 Minn. 401, (40 N. W. Rep. 370,) a dishonest disclosure by a debtor, or his refusal to

make a full disclosure upon an examination, may justify a conclusion that he has made a fraudulent disposition of his property, although there is no direct evidence of it; yet it is not a false disclosure, or a refusal to disclose, but a fraudulent disposition of property, which the statute makes a ground for an order allowing creditors to participate in the debtor's estate without filing releases. This is sufficient to dispose of the second finding.

But an examination of the record shows that the refusal of the debtors to answer the questions before the referee is entitled to but little weight. The refusal was not arbitrary, but under the advice of counsel, who were perhaps not entirely without excuse for suspecting that the questions were not wholly directed to the matter involved in the examination. The witnesses were not compelled to answer any question which counsel might see fit to propound to them, but were entitled to the ruling of the court on that point, and, in analogy to the old chancery practice of demurrer to the question, if a witness refuses to answer a question before a referee the party propounding it should have it certified to the court for its decision, and if he fails to do this the question will be considered waived. In the present case the petitioners took no steps to obtain the ruling of the court on the propriety of these questions, but on the hearing on the report of the referee the debtors themselves offered to answer the questions if the court should rule that they ought properly to do so, which offer was refused by the petitioners, who thus persisted in abandoning or waiving their interrogatories. It is also worthy of notice that the entire testimony of the witnesses before the municipal court, which had been reduced to writing, was introduced in evidence on this examination, so that the petitioners had all that they could have obtained by the answers to their questions.

Order reversed, and new hearing granted.

JACOB BLOOM vs. SAMUEL MOY and another.

June 2, 1890.

Fraudulent Conveyance—Action by Judgment Creditor—Judgment as Evidence.—Several decisions of this court followed, to the effect that a judgment creditor, suing to set aside as fraudulent as to creditors a conveyance by the judgment debtor prior to the judgment, must prove the existence of the debt on which it was rendered at the time of the conveyance, and that, as against the grantee, the judgment does not prove it.

Action brought in the district court for Carver county, by plaintiff, a judgment creditor of Samuel Moy, to set aside as fraudulent a conveyance from that defendant to the defendant Fritz Moy. At the trial, before *Edson, J.*, a dismissal was ordered at the close of plaintiff's case. A new trial was refused, and the plaintiff appealed.

Odell & Steidl, for appellant.

H. J. Peck, for respondents.

GILFILLAN, C. J.¹ The action was properly dismissed. When a judgment creditor, or one claiming through the judgment, brings an action to set aside, as fraudulent as to creditors, a conveyance of real estate by the judgment debtor prior to the judgment, he must show that the debt for which the judgment was rendered existed at the time of the conveyance. The judgment does not, as against strangers to it, prove the antecedent existence of the debt for which it was rendered. *Bruggerman v. Hoerr*, 7 Minn. 264, (337;) *Braleay v. Byrnes*, 20 Minn. 389, (435;) *County of Olmsted v. Barber*, 31 Minn. 256, (17 N. W. Rep. 473;) *Hartman v. Weiland*, 36 Minn. 223, (30 N. W. Rep. 815.) The plaintiff did not prove that the debt existed at the time of the conveyance. He attempted it, perhaps, by showing that a bill or claim of plaintiff against the judgment debtor was presented to the latter prior to the conveyance. Without deciding whether what the latter said at the time would have been evidence to prove, as against this defendant, the existence of the debt, it is enough to say that there was no evidence of the identity of the

¹ Vanderburgh, J., took no part in this case.

43	397
48	408
43	397
68	295
43	397
77	230
77	231

claim thus presented with the one on which the judgment was recovered. As plaintiff's action had to fail for absence of the proof mentioned, it was not material that evidence offered of a fraudulent intent was excluded. The admission of it would not have affected the result.

Order affirmed.

AUGUST WILSON and others *vs.* JAMES A. WILSON and others.

June 2, 1890.

Grant to Husband and Wife.—Under sections 43, 44, c. 45, Gen. St. 1866, (being sections 43, 44, c. 45, Gen. St. 1878,) upon a grant or devise to husband and wife, they take as tenants in common, unless expressly declared to be as joint tenants.

Action for partition, brought in the district court for Ramsey county. The land in question was conveyed in fee, on September 15, 1875, to "Alexander Wilson and Eleanor Wilson, husband and wife," to have and to hold "unto the said parties of the second part, their heirs and assigns forever." Alexander died November 27, 1887, intestate. Eleanor died August 10, 1888, testate. The plaintiffs, heirs-at-law of Alexander, and devisees under the will of Eleanor, contend that the deed of September 15, 1875, vested title in fee in Alexander and Eleanor as tenants in common in equal moieties, and not as tenants by the entirety. The defendants (devisees of Eleanor) appeal from an order by *Kerr, J.*, overruling their demurrer to the complaint.

A. G. Otis, for appellants.

James E. Trask, for respondents.

GILFILLAN, C. J.¹ The question in this case is, when a conveyance of real estate in fee is made to husband and wife, do they take as joint tenants, tenants in common, or do they become seised of the entirety, as it was called at the common law? An incident or property of this peculiar estate by the entirety, which it had in common

¹Vanderburgh, J., took no part in this case.

with the estate in joint tenancy, was the right of survivorship. But, unlike the case of joint tenancy, neither of the parties could alien without the assent of the other. The reason for the rule upon conveyances to husband and wife, as given by Blackstone, (book 2, c. 12, p. 182, Cooley's 2d Ed.,) was: "For, husband and wife being considered as one person in law, they cannot take the estate by moieties, (that is, each taking an undivided half of the whole estate,) but both are seised of the entirety *per tout et non per my*." It would seem as though, the reason for the rule having ceased, and unity, so far as rights of property are concerned, no longer existing, the wife being as capable of taking and holding property as though she were unmarried, and she and her husband being no more considered as one person in the law as to property, there could no longer be any foundation for the rule. And the statute has very clearly abolished that sort of tenancy—that is, by the entirety. The Revised Statutes of 1851 enacted, (chapter 43:)

"Sec. 43. Estates, in respect to the number and connection of their owners, are divided into estates in severalty, in joint tenancy, and in common; the nature and properties of which, respectively, shall continue to be such as are now established by law, except so far as the same may be modified by the provisions of this chapter.

"Sec. 44. All grants and devises of land, made to two or more persons, except as provided in the following section, shall be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy.

"Sec. 45. The preceding section shall not apply to mortgages, nor to devises or grants made in trust, or made to executors, or to husband and wife."

It is not easy to see why section 43, if it stood alone, would not abolish any other classification of estates held by two or more persons, in respect to their connection, than that made by the section, and reduce them all to estates in severalty, in joint tenancy, and tenancy in common. As to whether such a section does have that effect the courts in other states having similar statutes do not agree. But we are unable to see how full effect could be given to the language, as expressing the intention of the legislature, than by holding that un-

der that section alone there could be no such estate as by the entirety, and that upon a conveyance of the same tract to husband and wife they would take either as tenants in common or as joint tenants. How they would take, whether as tenants in common or joint tenants, would then be determined by section 44, were it not for section 45, which excepts from the operation of section 44 conveyances to husband and wife. Excepting such conveyances shows that in the mind of the legislature they would come within the operation of section 44 unless excepted; that is, that the husband and wife would take as tenants in common unless in the grant or devise it should be expressly declared to be in joint tenancy. These sections of the statutes of 1851 remained until the revision of 1866. In that revision, (c. 45) sections 43 and 44 were retained without change. Section 45 was retained, leaving out the words, "or to husband and wife." With that modification, the three sections are still in force, being sections 43, 44, and 45 of chapter 45, Gen. St. 1878. The change made in 1866, by striking from section 45 the words, "or to husband and wife," leaving to apply to a grant or devise to them the rule which section 44 applies to all other grants or devises to two or more persons in their own right, was significant. It showed an intent that upon a grant or devise to husband and wife they should take and hold precisely the same as two or more other persons would, upon a grant or devise to them; that is, as tenants in common, unless expressed to be in joint tenancy. Chapter 69 (of the revision of 1866) suggests a reason for it. Up to the time of that revision the common-law theoretical unity of husband and wife, and the common-law disabilities based upon it, continued. Upon the enactment of chapter 69, the unity of person, so far as related to rights of property, ceased to exist. After that the wife, with respect to taking, holding, and enjoying property, with some limitations, not based on any idea of her incapacity, but imposed to prevent frauds, was as though she were *sole*. The theoretical unity of person with respect to rights of property being done away with, it would have been inconsistent to retain any of the incidents of it. And we may suppose that, therefore, the legislature in the same statute did away with a provision retained by reason of it, by striking out the words, "or to husband and wife,"

from section 45, leaving applicable, to grants or devises to them, the same rule that applies to grants or devises to two or more other persons in their own right.

Order affirmed.

NOTE.

GEORGE MCALISTER, *vs.* JOHN E. OSBORNE.

June 2, 1890.

Appeal by plaintiff from a judgment of the district court for Hennepin county, where the action was tried by *Lochren, J.*

Hale & Peck, for appellant.

Weed Munro, for respondent.

GILFILLAN, C. J. This case follows the decision in *Wilson v. Wilson*, *supra*, p. 398.

Judgment affirmed.

GEORGE M. BURR *vs.* JOHN SEYMOUR.

June 2, 1890.

43	401
47	588
43b	401
63	207
48b	401
81	25

Service by Publication—Amendment of Affidavit.—In an action commenced against a non-resident defendant by publication of the summons, where judgment for want of an answer is properly entered, except that the affidavit of publication is insufficient, if the summons was in fact duly published, and no facts appear to show that it would be unjust to the defendant, or would affect intervening rights of third persons, the court ought, under Gen. St. 1878, c. 66, §§ 124, 125, to allow a proper affidavit of publication to be filed *nunc pro tunc*.

Appeal by plaintiff from the order of the district court for Crow Wing county, *Ensign, J.*, presiding, (acting for the judge of the 15th district,) which is mentioned in the opinion.

W. S. McClenahan, for appellant.

White & Reynolds, for respondent.

GILFILLAN, C. J. This action was commenced against a non-resident defendant by publication of the summons, and judgment was entered against him by default. The affidavit of publication of the summons filed with the clerk for entry of judgment did not show a

sufficient publication. Defendant, appearing specially for that purpose, moved to set aside the judgment on that ground. The plaintiff at the same time moved for leave to file *nunc pro tunc* a proper and sufficient affidavit of publication. The motions were heard at the same time, and by the same order the first motion was granted and the second denied. On the motions the plaintiff showed that the defect in the affidavit of publication filed, occurred through mistake and inadvertence, and that due publication was in fact made. Except on these facts, neither party invoked, and neither made any case calling into exercise, the discretion of the court. By the record the judgment appeared to be void. *Godfrey v. Valentine*, 39 Minn. 336, (40 N. W. Rep. 163.) And unless it should be corrected so as to show proper publication, and so as to make the record show a valid judgment, the defendant had a right to have it vacated. That is, the defendant (there being no question of laches in respect to making the motions in the case) was entitled to the relief he sought, unless the plaintiff's motion ought to have been granted; in which case, of course, defendant's motion could not prevail.

The question is, then, was the plaintiff entitled, under the facts appearing, to have the record corrected so as to show the fact as it actually was? We think he was. The jurisdiction of the court was acquired by the fact of service, and not from the proof of it filed. *Kipp v. Fullerton*, 4 Minn. 366, (473;) *Com'rs of Mille Lacs Co. v. Morrison*, 22 Minn. 178. So that as soon as the summons was duly published, the jurisdiction over the cause was complete, though no affidavit of publication had been made. And we may say here that, were this judgment set aside, the plaintiff could at once file proper proof of publication, and, as the time for defendant to answer had expired, the same judgment might immediately be entered. The plaintiff was in the same position when the judgment was entered. He was entitled to the judgment. By reason of the mistake or inadvertence in the matter of the affidavit of publication filed, he failed to secure a judgment valid upon the record, but which would be valid if the fact as it was in respect to the publication had been made to appear in the record. The power of the court to amend the record in such a case cannot be doubted. Gen. St. 1878, c. 66, §§

124, 125. It is a power given to be exercised in the furtherance of justice. Of course, if, since the entry of such a judgment, circumstances have arisen that would make it unjust to the defendant, or if rights of third parties have intervened, so that the amendment might operate as fraud upon them, it ought not to be allowed. A party ought not to be relieved, at the expense of others, from the consequences of his own mistake or inadvertence. If any one must suffer from it, he, and not other innocent persons, should be the sufferer. But where, as in this case, there is only the bare fact that, in a cause of which the court had complete jurisdiction, the party has failed, through mistake, to secure what he was of right entitled to, we think the statute intends that the omission or mistake shall be corrected. If not a matter of strict right in such a case, sound discretion should grant the relief. We do not mean that defects in jurisdiction, mistakes or omissions that prevent the jurisdiction attaching, may be cured *nunc pro tunc*; and we suspect that, in refusing the relief, the court below had not in view that, notwithstanding the defect in the affidavit of publication, the court had full jurisdiction of the cause, and when the judgment was entered the plaintiff was entitled to it.

Order reversed, and the court below will enter an order refusing defendant's and granting plaintiff's motion.

43	403
51	410
43	403
171	66
43	403
175	7

ANGELINE GOODWIN and others *vs.* CHRISTIAN F. KUMM and others.

June 5, 1890.

Rebutter by Collateral Warranty.—The doctrine of rebutter by collateral warranty is not a part of the common law of this state.

Husband and Wife—Right of Survivor in Lands Conveyed during Coverture.—Under Gen. St. 1878, c. 46, § 3, it is only the interest of the surviving wife in lands of which the husband died seised or possessed which is "subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate."

Appeal by plaintiffs from a judgment of the district court for Fillmore county, where the action was tried by *Farmer, J.*

Burdett Thayer, for appellants.

H. R. Wells, for respondents.

MITCHELL, J. This was an action for the partition of certain lands of which plaintiffs allege they are the owners of one undivided third, and the defendants of the other undivided two-thirds. The agreed facts are that in April, 1878, one John R. McKisson, being then the owner of the land in question, conveyed it, with full covenants of warranty, for a consideration greater than its present value, to defendants' grantor, his wife, Annie Mary McKisson, not joining in the deed, and never having in any manner assented thereto in writing. John R. McKisson died intestate in February, 1885, and his wife, also intestate, in November, 1886. The plaintiffs are their only children, and consequently the heirs-at-law of each of their parents. "The plaintiffs took no property whatever as heirs-at-law aforesaid, except they make claim to one-third of the lands aforesaid." Plaintiffs claim title to the third as heirs of their mother, and defendants title to the whole under the deed referred to from plaintiffs' father. Some other facts were stipulated which defendants urge as a ground of estoppel *in pais* against plaintiffs, but, as they are clearly insufficient for any such purpose, we omit them as being wholly immaterial. The court below gave judgment for defendants upon the ground of an estoppel and rebutter of plaintiffs by the covenants in the deed of their father to defendants' grantor. As plaintiffs are claiming under their mother, these covenants are, as to them, collateral, and not lineal. And, if the court intended to apply the ancient English doctrine of rebutter by collateral warranty, we have no hesitation in holding that this doctrine is not, and never was, any part of the common law of this state. It was based upon the mere presumption that the heir might thereafter take assets by descent from or through the same ancestor. 2 Bl. Comm. 302. Being founded on neither reason nor justice, both English and American judges have united in denouncing the whole doctrine as unjust and indefensible. It has never been generally adopted in the United States. 4 Kent, Comm. (12th Ed.) 469; *Russ v. Alpaugh*, 118 Mass. 369. Indeed, even in England,

ever since the statute of Gloucester, (A. D. 1278,) over 600 years ago, the doctrine would not have applied to the facts of this case; for that statute provided that the warranty of the father should not bar the son, who was the heir of both parents, from claiming the land in the right of his mother, except so far as assets descended to him from the father.

But we apprehend that the principal ground upon which the court below decided the case, as it is the principal one urged here by counsel, was, to quote the language of the learned judge in his memorandum: "The mother took the title to this undivided third of the land, subject, in its just proportion with other real estate, to the payment of such debts of the father as are not paid from his personal estate; and, if plaintiffs take one-third of the land, that would constitute a breach of the covenants in the father's deed, the damage for which (equal to the value of the land) would be a valid debt or claim against the father's estate; and, as there does not appear to be any personal estate or any other land except this one-third, then, as it will take the whole of this third to pay this claim, therefore, to avoid circuity of action, the rule of rebutter should apply."

The statute under which the wife took this third is as follows: "Such surviving husband or wife shall also be entitled to and shall hold in fee-simple, or by such inferior tenure as the deceased was at any time during coverture seised or possessed thereof, one equal undivided one-third of all other lands [other than the homestead] of which the deceased was at any time during coverture seised or possessed, free from any testamentary or other disposition thereof to which such survivor shall not have assented in writing, but subject, in its just proportion with the *other* real estate, to the payment of such debts of the deceased as are not paid from the personal estate." Gen. St. 1878, c. 46, § 3. It will be observed that the entire reasoning of the trial judge, as well as that of the defendants' counsel here, proceeds upon the theory that this undivided third, if recovered by the heirs of the wife, would itself be assets for the payment of the husband's debts; for otherwise the doctrine of estoppel in order to prevent circuity of action could have no application. And, if it would be assets at all for that purpose, it would be such for the pay-

ment of all debts, at least in its just proportion "with other real estate;" for it would be no more liable for a debt arising out of a breach of these covenants than for any other debt of the husband.

But, conceding for the present that this third would, if recovered, be assets for the payment of the husband's debts, the facts stipulated are entirely insufficient to make a case for the application of the doctrine of estoppel. According to defendants' own theory, the title to this undivided one-third vested in the wife subject only to the payment, in its just proportion with other lands, of debts not paid from the personal estate. By the laws of this state the personal estate, and after it the real estate, of a deceased person, is liable, in due course of administration, for the payment of his debts; and the remedy of creditors must ordinarily be sought only by presenting and proving their claims in the administration proceedings, and obtaining payment out of the personal property, or, if necessary, by sale of the real estate under license from the probate court; and the heirs or devisees are not liable to an action by creditors, even if they have received assets, except in the case of a contingent claim which did not become absolute until after the administration had been taken out, and the estate fully settled, or, at least, the time limited for creditors to prove their claims had expired. Hence, to entitle defendants, in any view of the case, to invoke an estoppel, it was incumbent on them to show that the estate of the husband had been administered on, and that there were no assets remaining out of which to pay their claim. The trial court seems to have assumed that the agreed facts showed this. But this was clearly a mistake. The stipulation is merely to the fact that the plaintiffs have taken (received) no property as heirs, (either of the father or mother,) except that they make claim to this third of these lands. It does not appear from this that administration has ever been taken out at all on the husband's estate, or, if so, that there is not ample personal property to pay all debts in full, or, if not, that there are not other lands subject to the payment of debts. All that this third is liable for, according to defendants' own theory of the law, is the payment in its just proportion with other lands of the debts after the personal estate is exhausted; and yet, notwithstanding there may be ample personal estate as well

as "other lands," it is proposed by this doctrine of estoppel to saddle the entire burden of paying this debt upon the interest of the wife's heirs in this land. Such a course would likewise result in appropriating this interest to the payment of this one claim, to the exclusion of other creditors who are equally entitled to share in it, if it be assets at all for the payment of debts. The law is not so eager to avoid circuity of action as to do such gross injustice in order to effectuate it.

This would be decisive of the present appeal; but we are not inclined to rest the decision upon grounds that may not be decisive of the action on the merits as they may appear upon another trial. It seems to us that counsel are entirely mistaken in assuming that the third interest of the surviving wife in land of the husband, conveyed by him during coverture by his sole deed, is, or under any circumstances can be, subject to the payment of any part of his debts. After he has thus conveyed he has no longer any interest in it, and it is no part of his estate upon his decease. How, in view of this fact, it can be held to be assets for the payment of his debts, it is difficult to see. Had neither the wife nor her heirs claimed this land, no one would assert that the husband's creditors could subject it to payment of his debts, and yet, according to defendants' contention, the mere fact that the wife or her heirs do claim it makes it assets for the payment of these debts; and not only this, but the very assertion of this claim by the wife or her heirs creates the debt for which it is to be made liable. If this is true, all that a husband would have to do to effectually deprive a wife of her statutory interest in his real estate would be to convey it by his sole deed, with covenants, which, in case she claimed her third after his decease, would create the very debt against his estate which would prevent her recovery. The husband cannot thus do by indirection what the law prohibits him from doing directly. The fact that the land conveyed by the husband during coverture is no longer his property, and no part of his estate at his decease, is utterly inconsistent with the idea that the wife's interest is assets subject to the payment of his debts. The misconception of counsel arises out of the peculiar and somewhat misleading language of the statute. At common law, the

wife had dower in all lands of which the husband was seised at any time during coverture, whereof she had not relinquished her right. This dower was not subject to the payment of his debts, as it could not well be, for it might include lands which were no part of his estate at his decease. In many of the states dower is by statute limited to lands whereof the husband died seised; and in some states this statutory dower is subject to the payment of debts, as it consistently might be, for all the lands in which the wife could have dower would be part of his estate. But our statute has adopted the unprecedented plan of giving the wife a third of all lands which the husband has conveyed during coverture without her written assent, as well as of lands of which he died seised, and at the same time of making this third, in some lands at least, subject to a certain extent to the payment of the husband's debts. The only construction of this statute consistent with legal principles or in harmony with its general scope and object, is that it is only the wife's interest in the lands owned by the husband at the time of his death, and consequently a part of his estate, which is "subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate." The expression "other real estate" clearly means real estate belonging to the deceased husband or wife, and the word "other" implies that the real estate which is to share with it the burden of paying debts is also the property of the deceased, which would not include property conveyed by him or her during life. This construction may have the effect of putting the survivor in a better position as to lands conveyed by the deceased than in those of which he or she died seised, but we do not see how the statute can admit of any other reasonable or practicable construction.

Judgment reversed.

C. AULTMAN & Co. vs. OLE OLSON, JR., impleaded, etc.

43	409
174	116
74	117
43	409
80	522

June 5, 1890.

Conditional Sale—Retaking of Goods by Seller—Subsequent Action for Price.—*Minneapolis Harvester Works v. Hally*, 27 Minn. 495, followed, holding that a certain instrument constituted a conditional sale, and that an action could not be maintained against the purchaser on a note given for the purchase price, after the property which was the expressed consideration for the instrument had been taken from him by the vendor.

Same—New Promise—Consideration.—*Held*, also, that there was no evidence of any consideration for a subsequent promise to pay the note.

Appeal by plaintiff (a corporation) from an order of the district court for Polk county, *Mills, J.*, presiding, refusing a new trial.

P. C. Schmidt, Pierce & Cromb, and *R. H. Thomson*, for appellant.
H. Steenerson, for respondent.

MITCHELL, J. The instruments declared on are not, in legal import, distinguishable from the one considered in *Minneapolis Harvester Works v. Hally*, 27 Minn. 495, (8 N. W. Rep. 597,) in which it was held that, the property which was the expressed consideration for the instrument having been taken from the possession of the defendant by the plaintiff and sold, there was a total failure of consideration, and therefore an action on the instrument for the price of the property could not be maintained. This proceeded upon the theory that the contract was a mere conditional sale, or rather an executory contract for a sale on condition, and that, the plaintiff having elected to take back the property and treat his title as unconditional, the defendant could not be required to pay for it. It seems to have been considered that the case was analogous to, if not controlled by, that of *Third Nat. Bank v. Armstrong*, 25 Minn. 530. A comparison of the instruments in the two cases, however, will show that there was room for a distinction, and for argument that, while one constituted a conditional sale, the other was a mortgage. But, even if there be doubt as to the correctness of the decision in *Minneapolis Harvester Works v. Hally*, we are not now inclined to over-

rule it. It has become, in a sense, a rule of property, and is supported by authority elsewhere. See *Brewster v. Baker*, 20 Barb. 364. Following that case, the court below was right in directing a verdict for defendant, if the property was taken from the defendant by plaintiff under and by virtue of the contract contained in the notes sued on. Plaintiffs' counsel virtually admits this, but contends that there was evidence which should have been submitted to the jury, tending to prove that this contract had been superseded by a subsequent one, and that the property was taken under this new agreement. There was some new arrangement between the parties, which was reduced to writing; but the writing had been lost, and secondary evidence of its contents was introduced. This evidence was somewhat conflicting, and very vague and unsatisfactory. But if we take that which was most favorable to the plaintiffs, and give it the construction most favorable to them, we are unable to spell out of it any consideration for a new promise to pay these notes. All that counsel himself claims that this new agreement amounted to is that defendant agreed and consented that plaintiffs should take the property and sell it, and apply the proceeds on these notes, and that until such time as it could be sold the defendant should operate the machines, and pay over to plaintiffs one-half of the receipts, to be also applied on the notes. But the only thing in all this bearing the semblance of a consideration moving from the plaintiffs or to the defendant was the arrangement that until the machines were sold defendant might operate them, retaining one-half of the gross receipts. But the fatal defect in this, as a consideration for a contract, is that it obligated plaintiffs to nothing, and assured nothing to defendant. Plaintiffs were not bound to permit defendant to operate the machines for any period of time whatever. They had a perfect right to take them at any moment. The agreement gave defendant no legal rights whatever,—nothing that was capable of enforcement.

Order affirmed.

NEIL CURRIE and another vs. J. A. PAULSON and others.

43	411
50	356
48	411
66	531

June 5, 1890.

Change of County-Seat—Petition—Determination of County Board as to Signatures.—Where the board of county commissioners, in accordance with the provisions of Laws 1889, c. 174, inquire into and determine what, if any, signatures to a petition for the removal of a county-seat should be deducted therefrom, and file their certificate thereof, and, according to such certificate, there still remain on the petition sufficient names to authorize the ordering of an election, it becomes the duty of the county auditor to make such order; and the election held in pursuance thereof will not be void because of any error or mistake of the board in determining, upon the evidence before them, what signatures were improperly on the petition.

Same—Effect of Determination.—The determination of the board in that regard, at least in the absence of fraud, is conclusive.

Appeal by the contestants, Neil Currie and Nick Weber, from a judgment of the district court for Murray county, *Perkins, J.*, presiding.

H. C. Grass and *Geo. W. Wilson*, for appellants.

P. P. Smith, B. H. Whitney, Lorin Cray, and J. L. Washburn, for respondents.

MITCHELL, J.¹ This is an appeal from the decision of the district court in a proceeding instituted to contest the validity of a special election, held pursuant to chapter 174, Laws 1889, upon the question of changing the county-seat of Murray county. The case is brought here upon the findings of the trial court, and the only question is whether these findings support the conclusions of law.

The original petition filed with the auditor was in due form, and purported to be signed by what would be, under any construction of the act, the requisite number of legal voters of the county, and was accompanied by the required affidavits. The county board, having, at a special meeting duly held for that purpose, proceeded to inquire into and determine the matters submitted to their determination by

¹ Vanderburgh, J., took no part in this case.

the second section of the act, and having concluded their inquiries, made, signed, and filed in the office of the county auditor a certificate that all the signatures to the petition were genuine, that all of the persons who signed it were at the time legal voters of the county, and that all of the signatures were attached within 60 days preceding the filing of the petition in the auditor's office. Upon the filing of this certificate, the auditor, as required by law, made and filed an order fixing the time for holding the election, which was held accordingly, and at which the requisite majority of the legal voters voted in favor of the proposed change of location of the county-seat. No fraud on the part of the county board is charged or found, but the contestants claim that it appears that 256 persons who signed the petition for the change of county-seat subsequently signed and presented to the county board a remonstrance against the change; that this was equivalent to their withdrawing their names from the petition, and therefore the county board should have stricken them off, and not counted them; and that, with these names deducted, the number remaining would have been insufficient to authorize ordering an election. Put in plain words and short form, the contention is that, upon the evidence before them, the board came to a wrong conclusion as to the number of names that should have been stricken from the petition, and because of that error the election is void, notwithstanding that, upon their determination as made and filed, and a comparison of the petition with the number of votes cast at the last general election, the auditor was authorized and required to make an order for the special election.

The act of 1889, in relation to the removal of county-seats, has few equals, even in our statutes, as examples of crude legislation; and we deem it wise to confine ourselves strictly to the questions necessary to be decided in each case as they arise, hoping that the law may be amended before either the people or the courts will be further troubled in attempting the difficult task of construing or reconciling its provisions. Without passing upon the correctness of any of the premises assumed by contestants, or deciding for what causes, occurring before the election itself, an election may on contest be held void, we are clear that (at least in the absence of fraud) the cer-

tificate of the county board as to what signatures, if any, are improperly on the petition, is final and conclusive; and that if from that certificate, as made and filed, it appears that there remain on the petition the required number of names, it is the duty of the county auditor to make his order for the election, and that an election held in pursuance thereof will be valid, notwithstanding any mistake or error committed by the board as to the facts submitted to their determination regarding the names improperly on the petition. In the very nature of things, the determination of the board on this matter must be final and conclusive. It was certainly not contemplated, and contestants do not claim, that the court upon contest could proceed on new evidence to try *de novo* the question as to the genuineness of signatures, or the qualification of the signers; for if so the election might be held void although the county commissioners decided rightly upon the evidence before them. If the court is to review the determination of the commissioners at all, it must be by attempting to put itself in their place, and consider how they ought to have decided upon the evidence which they had before them. But the law makes no provision for preserving this evidence, or making up any record of it. If, as will often be the case, the evidence is oral, there is no possible way of ascertaining what the evidence before the board was. This difficulty is illustrated by the present case, in which the trial judge assumes to find what certain witnesses swore to before the board.

There are manifest reasons why the determination of the board of commissioners as to these facts should be final. It is the vote of the electors at the election, and not the signatures to the petition, which determines the location of the county-seat. The main if not sole purpose of requiring the petition in favor of a change before ordering an election is to save the public from the expense, loss of time, and excitement incident to such an election, unless there is a reasonable probability that the required majority of electors will vote for the change. To go back of the action of the county board, and reverse their determination as to these facts, after the election is passed and the change carried by the popular vote, would certainly subserve no good purpose.

Our decision is confined to the facts of this case, where the petition was sufficient on its face, and the matters in relation to it submitted by the act to the determination of the county board were regularly and properly before them for their action. Our conclusion is that, even if the findings of the trial court show all that contestants claim for them, it would constitute no ground for avoiding the election. We might remark, however, that it is more than doubtful as to whether it appears from the findings that there was any proof before the county board that any of those who signed the petition had withdrawn, or attempted to withdraw, their signatures, by signing a remonstrance against the proposed change. The only thing on that question was the so-called "remonstrance" itself; and, while the act refers to remonstrances, and assumes to impose certain restrictions upon their presentation, yet we fail to discover that they amount to anything, or have any office to perform. They are not made evidence of anything; and, as the county board has no discretion in the matter of the removal of the county-seat, it is difficult to see what effect a remonstrance can have, one way or the other.

Judgment affirmed.

43	414
50	462

JOHANNA DUGAN vs. ST. PAUL & DULUTH RAILROAD COMPANY.

June 5, 1890.

Railway—Negligence—Blowing Whistle.—*Held* that, upon the evidence, the question whether the blowing of a locomotive whistle by defendant's servants was, under the circumstances, negligent, was for the jury.

Same—Void City Ordinance Admitted in Evidence—Error held Fully Corrected by Instructions.—*Held, also,* that error in admitting in evidence a void city ordinance regulating the blowing of locomotive whistles was fully corrected by the court's subsequently instructing the jury that it was void, and that they should not consider it, but treat the case as if no ordinance had been passed, and then instructing them correctly as to the rules of law applicable to the case.

Same—Different Rule where Evidence is of Facts.—Such a case distinguished from one where incompetent evidence as to the *facts* has been once admitted, and subsequently withdrawn from the consideration of the jury.

Appeal by defendant from an order of the district court for St. Louis county, refusing a new trial after a trial before *Stearns, J.*, and verdict of \$4,040 for plaintiff.

Cash & Williams, for appellant.

Edson & Hanks, for respondent.

MITCHELL, J.¹ This was an action to recover damages for personal injuries caused by the alleged negligence of defendant. The negligence complained of was blowing a locomotive whistle in the city of Duluth, in close proximity to some teams, one of which became frightened thereby, and ran away, and injured the plaintiff while in one of the streets of the city. The complaint was framed with a view of alleging a cause of action for negligence both under an ordinance of the village (now city) of Duluth forbidding the blowing of such whistles within certain limits except for certain specified purposes, and also independently of the ordinance; the allegations being that the whistle was blown carelessly, negligently, wantonly, and recklessly, with frightful noise, at or near a crossing, and near a team then lawfully in a public highway. While introducing his evidence, plaintiff's counsel evidently had in mind making out a case under the ordinance; yet all the evidence, except the ordinance itself, was relevant on the general question of negligence, without regard to any ordinance. If there was prejudicial error in admitting the ordinance, the record discloses none; and the evidence was sufficient to justify the verdict.

Whether the whistle was blown, and whether it caused the team to run away which injured plaintiff, were, under the testimony, certainly, questions for the jury. So, also, was the question whether, under the circumstances, the blowing of the whistle was negligent. It is a matter of common knowledge that cars and locomotives cannot be moved without making certain noises, but blowing the locomotive

¹ Vanderburgh, J., took no part in this case.

whistle is not one of these ordinary and necessary noises, but is only used on certain occasions as a signal or warning. It is also true that, under certain circumstances, it may become absolutely necessary to blow the whistle as a warning to persons on the railway track, or as a signal to employes of the company while engaged in moving or making up trains, and that to refrain from giving the signal or warning, under such circumstances, even near public streets or crossings, would be positive negligence. It is also true that those engaged in running locomotives may often be required to be so intent in the performance of their duties that they cannot be on the lookout to see whether there are teams in such proximity as to be liable to be scared by the whistle. Doubtless, often the duty of looking out for this is on the drivers of the teams, and not on the engineer in charge of the locomotive. Still, such a noise on or near a public thoroughfare, in a town or city, is so liable to scare teams, and cause just such accidents as happened in this case, that a due regard for the rights of others requires that the whistle should not be blown in such a place without cause and recklessly. The evidence in this case tended to show that the whistle was, in this instance, blown sharply and loudly in a public place, near a number of teams lawfully standing in a public street, and that it was not blown as an alarm of fire, or as a warning to any person or thing on defendant's track. It is true it might have been necessary to blow it for some other purpose; but, as plaintiff offered evidence tending to negative the existence of those causes which most usually call for such a signal, and as the defendant did not attempt to prove the existence of any necessity for blowing it, but, on the contrary, adopted a line of defence (denying that it was blown at all) which negated the idea of the existence of any such necessity, the question of negligence was certainly one for the jury.

The question whether the driver of the team which ran away left his team unguarded, if material at all, was also, under the evidence, one for the jury. But, even if he was negligent in this respect, it would simply be a case where the negligence of a third party contributed with that of defendant to cause the injury. Again, the most that can be claimed for the evidence as to plaintiff's contributory negligence is that it also presented a question for the jury. The fact that

she was not on the lookout for teams while in the unopened and unused part of a street where teams never travelled, was certainly not negligence *per se*; and even if it be true that it was an act of trespass for this woman, in common with her neighbors, to occupy this untravelled and unopened part of the street as a place to keep wood, still this is wholly immaterial, as that fact in no way proximately contributed to her injury.

Hence the only important question in the case is whether the admission in evidence of the ordinance, assuming that it was void, was prejudicial error. It was admitted against defendant's objection, but, when the judge came to charge the jury, he expressly told them that it was not valid, and that they need not consider it, but place the case on the same ground that it would be if there was no ordinance; and he then proceeded, and charged fully and correctly on the law of the case, without reference to, and independently of, any ordinance. Where improper evidence bearing upon the *facts* of a case has once been admitted, the courts are very slow to hold that the error is remedied by subsequently withdrawing it from the consideration of the jury, and will never do so unless it is very clear, from the nature of the case, that the party could not have been prejudiced. The reason for this is that it is usually impossible to say that the impression once made upon the minds of the jury by the objectionable testimony was wholly removed by its subsequent withdrawal, or by instructions from the court to disregard it. But this is an entirely different case. The ordinance was not offered to prove, and it did not tend to prove, any of the facts connected with the case, but merely to prove the rule of law applicable to it. The only necessity for introducing such ordinances is that, unlike general statutes or laws, the courts do not take judicial notice of them. The case is substantially the same as if a court should erroneously state to the jury that a certain statute was applicable to a case, or should give them any incorrect instruction as to the law, but should subsequently retract it, by expressly and unequivocally telling them that it was wrong and should be disregarded, and then giving them correct instructions. It has been repeatedly held that this is not prejudicial error, provided the court corrects its mistake in such clear and

explicit terms that there is no danger of the jury being confused or misled by contradictory instructions. We can see no real distinction between such a case and the present one.

Order affirmed.

48	418
48	532
43	418
50	136

WILLIAM S. MOORE and another vs. CITY OF MINNEAPOLIS.

June 6, 1890.

Police Regulation—Employment Agencies.—The business of employment agencies *held* a proper subject of police regulation by the state.

Same — City Ordinance not Repealed by General Law.—The city council of the city of Minneapolis having been empowered by special act to license and regulate that business, and an ordinance having been adopted requiring licenses for the prosecution of that business, and prescribing regulations concerning it, it is *held* that a subsequent general law, requiring licenses to be procured by those conducting agencies for the employment of *men*, did not by implication repeal the special act.

Same—Additional Fee for making out License.—While the charging of a fee for making out a license, in addition to the prescribed license fee, was unauthorized, the complaint is *held* not to allege a cause of action for the recovery back of the excessive charge.

Appeal by plaintiffs from an order of the district court for Hennepin county, *Hicks, J.*, presiding, sustaining a demurrer to the complaint.

Steele & Rees, for appellants.

Robert D. Russell, for respondent.

DICKINSON, J.¹ This is an appeal from an order sustaining a demurrer to the complaint. The action is for the recovery of the sum of \$151, paid by the plaintiffs to the city of Minneapolis to procure a license to conduct an employment agency within the city for the procuring of employment for male persons. The ground upon which repayment is sought is that the city ordinance requiring

¹ Vanderburgh, J., was absent and took no part in this case.

licenses from the city for such purpose was invalid, for reasons to be hereafter considered, and that the plaintiffs paid the fee for such license under threats of arrest and prosecution if a license were not procured, the payment being claimed to have thus been made under duress. The business was a proper subject of police regulation and control. The nature of the business, and the character of those with whom the business is likely to be conducted, in point of intelligence, experience, and capacity for self-protection from fraudulent practices, are such that it might well be deemed necessary by the legislature, as a matter of proper police regulation, that, by means of a license system, dishonest and disreputable persons should, so far as possible, be excluded from the right to engage in the business, and that the conduct of the business be so regulated as to afford means for the detection of fraudulent practices and of redress for wrongs done. The propriety of police regulation seems apparent when it is considered that, by means of such agencies, ignorant and credulous persons might easily be defrauded of their money under a mere pretence of employment to be afforded them in a distant part of the state, so that the fraud would not be discovered until the victim should have gone so far away as to be unlikely to trouble the fraudulent agent by prosecution. Again, such business might be resorted to as a means of bringing girls into places unfit for their employment or presence.

The charter of the city authorized the city council, by ordinance, "to license and regulate * * * keepers of intelligence or employment offices, as well as all persons doing the business of seeking employment for others, or procuring or furnishing employes for others." The charter further confers the power, among other things, to require all persons doing such business to keep for inspection records of their business, and to furnish to the persons with whom they deal written evidence of their transactions, and gives power to punish all kinds of unfair dealing. Sp. Laws 1881, c. 76, *subc. 4*, § 5, subd. 1, as amended by Sp. Laws 1888, c. 3, § 10, p. 73. The ordinance adopted under the authority of this law required applications for licenses to be passed upon by the city council, and prescribed certain regulations of the business, the propriety of which is not in question. It prescribed a license fee of \$10 when the business was to be lim-

ited to the employment of females within the counties of Hennepin and Ramsey, and \$150 when the business was to extend to the employment of males without territorial limits, or of females elsewhere than in the two counties named. It is contended that the special law conferring authority upon the city council relative to this subject was in effect repealed by the subsequent enactment of a general law, (Laws 1885, c. 205,) in which case the ordinance would cease to be of effect. The statute last referred to is general in its terms, but it relates only to the business of agencies for the employment of *men*. Persons engaging in that business are required to procure licenses therefor from the municipal council, if the business is to be carried on in a city or village, or from the county commissioners, if it is to be carried on in the country. A license fee of \$100 is required to be paid, and a bond for \$10,000 to be executed, whereupon the applicant "shall be entitled to such license;" and the licensee "may, while continuing to reside or maintain his office at the place mentioned in such license, prosecute his said business in any part of the state." No other regulation of the business is effected by this law. There is no declared repeal of inconsistent acts. We deem it unnecessary to consider the point made by the defendant that this act is void for uncertainty. Some of the distinctive features of the two acts should be particularly observed: (1) The special act relates to the employment of both males and females, while the general law relates only to the employment of "men." (2) Under the special law the license is limited to a period of one year, while under the general law it is not thus limited, and may extend to the period of the natural life of the licensee. (3) The special act gives the power to license and regulate, while the general law confers no authority to regulate the conduct of the business. (4) Under the special act, the council might doubtless refuse a license to an unfit applicant, but the general law seems to make the payment of the fee and the executing of the bond as prescribed the only conditions upon compliance with which he "shall be entitled to such license." The special act remains in force unless by implication merely the general law repealed it, and only so far as the latter act may be found inconsistent with the earlier can the latter be deemed to have been repealed. The special

act was of much wider scope than the other, and, if the general act be regarded as repealing so much of the special as relates to agencies for the employment of men, yet the provisions of the special act relating to the employment of females (and perhaps of *boys* also) still remain in force. Nor, so far as concerns that subject, is the ordinance passed in pursuance of the special law rendered inoperative.

Allowing both laws to have such effect within the city of Minneapolis,—the one as respects the employment of men and the other as to the employment of females,—we should have these results, in respect to the two classifications or branches of business: In one case the applicant (the special act and ordinance controlling) is to pay a license fee of \$150 for a one year's license; to give a bond for \$1,000; the license may be refused if the applicant is not a proper person to conduct the business; and the licensee is subject to the police regulations prescribed in the ordinance. In the other case, the applicant is to pay a smaller license fee (\$100) for a license which may extend for the period of his natural life; he is to give a bond for \$10,000; is entitled to a license, as it would seem, although he be of disreputable character; nor is he subject to the police regulations prescribed under the special law; and the general law prescribes no regulations beyond the mere license. While there may be reasons for some distinctions in the regulations which it might be deemed expedient to apply to such a business, depending upon the fact as to whether it is to relate to the employment of males or of females, the distinctions to which we have referred cannot well be deemed to have been intended to exist, based upon any such considerations. When allowing the later law to have effect as repealing or modifying an earlier is productive of such results, a reason is presented, in addition to the general rule that repeals by implication are not favored, for considering whether some other construction is not more likely to be in accordance with the intention of the legislature. It is hardly to be supposed that the legislature intended the subject of employment agencies within the city of Minneapolis to be so divided, and to be controlled by laws so different, if not incongruous; yet it is certain that the local law remains in force, at least as to agencies for the employment of females.

Again, it is to be considered that an intention on the part of the legislature that a law should have the effect to repeal or modify a prior act is less readily to be implied where the prior act is of a special nature,—as the provisions of a municipal charter, presumably enacted with regard to what was deemed expedient under particular circumstances, or in a particular locality,—than if the prior act were general. *McKenna v. Edmundstone*, 91 N. Y. 231, and cases cited; *Walworth Co. v. Village of Whitewater*, 17 Wis. 193; *City of Janesville v. Markoe*, 18 Wis. 350; *Brown v. County Commissioners*, 21 Pa. St. 37; *State v. Mayor, etc.*, 33 N. J. Law, 57; *Wood v. Election Comm'rs*, 58 Cal. 561; 1 Dill. Mun. Corp. § 87. The only possible way to avoid the results which we have referred to is to construe the general law as not intended to repeal the special act, or to affect its local operation, but as applicable in cities, villages, and elsewhere, where no such prior law was in force. This, we think, is the proper construction to be placed on the law.

It is not apparent from the complaint that the license fee prescribed by the ordinance was unreasonable. See *City of Mankato v. Fowler*, 32 Minn. 364, (20 N. W. Rep. 361;) *In re White, supra*, p. 250.

We do not understand that the charge of one dollar for the clerical work of issuing the license, in addition to the fee prescribed by the ordinance, was authorized; but we think the complaint hardly sufficient as a statement of a cause of action for the recovery of that sum. The allegations of the complaint as to duress and compulsory payment seem not to have been made with reference to the one dollar charged for the clerical work of making out the license. While the plaintiff complains that he was compelled to take out a license by threats of arrest and prosecution if he did not do so, it would seem that the cause of action set forth and relied upon was the invalidity of the ordinance, which is particularly alleged, rather than any unlawful exaction of the officer who may have issued the license.

Order affirmed.

NOTE. A motion for a reargument of this case was denied June 19, 1890.

MARTIN LARSON vs. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

June 9, 1890.

43 423
51 198

Railway—Section-men—Assumption of Risk of Extra Trains.—A section-man who had worked more than three months on the track of a railroad, where about one-third of the trains passing over the same were irregular or extra trains, not running on schedule time, *held* to be chargeable with notice of the practice to run such trains, and hence that he assumed the risk incident to the service from that cause.

Same—Negligence—Evidence of General Custom.—Proof of a general custom as to the running of such trains is competent, as affecting the question whether it is negligence to so operate them.

Evidence—Waiver of Objection.—An admission that an office entry of the running of specified trains was "the record of the trains," although its reception in evidence was objected to, *held* a waiver of such qualifying proof as might otherwise have been necessary preliminary to the introduction of the evidence.

Appeal by plaintiff from an order of the district court for Grant county, refusing a new trial after a trial before *Holland, J.*, and a dismissal ordered at the close of the evidence.

J. W. Reynolds, for appellant.

M. D. Grover, for respondent.

DICKINSON, J. This is an action for the recovery of damages for a personal injury suffered by the plaintiff in the same accident which resulted in the action of Olson against this defendant, our decision in which is reported in 38 Minn. 117, (35 N. W. Rep. 866.) The facts of the case now before us are for the most part the same as those stated in the opinion above cited, and need not be here repeated; but some facts peculiar to this case will be referred to. The plaintiff was one of the section-men—three in number, including the foreman—who, in the discharge of their duty as the defendant's servants, were pushing the hand-car westward, during a westerly snow-storm, when they were overtaken by the engine and snow-plough coming from the east, and running "wild," that is, not on the schedule time of any train. The plaintiff's two companions were killed.

After the evidence had all been presented the court dismissed the action. In this appeal from an order refusing a new trial, the principal question to be considered is whether upon the whole case it ought to have been submitted to the jury.

It may be taken as settled that it was the duty of the defendant to inform its section-men, unless they had already been advised of the fact, of its practice to run irregular trains without special notice to them. *Olson v. St. Paul, M. & M. Ry. Co., supra.* But it is also to be considered that if one in such employment had in any other manner learned of this practice, or if in the exercise of common intelligence and prudence in his employment he ought to have learned it, it would be presumed that he had acquired such knowledge, and had assumed that risk, or else, if he had not thus learned the fact, that he had been guilty of such negligence on his own part as should preclude a recovery. *Olson v. St. Paul, M. & M. Ry. Co., supra.* The testimony of the plaintiff went to show that he had not received actual notice of this practice, and it remains to be considered whether the case showed either that he had acquired knowledge of the fact by other means, or that he was chargeable with negligence if he had not done so, and whether this appeared so conclusively that the court was justified on that ground in refusing to submit the case to the jury. We are of the opinion that the dismissal of the action was justified upon this ground.

The plaintiff had been employed in this work but a week immediately preceding the accident, during which time he had lived with the section-foreman at a house on the line of the road. But more than two years before he had been for some three months in the same employment, on this same section of the road, and boarded at the same section-house. During that time about one-third of the trains over that section of the road were irregular or wild trains; and during the week of the plaintiff's employment, immediately preceding the accident, there were nine trains of that character. The plaintiff's constant employment was on and beside the track over which the trains were operated. He went over his section in a hand-car, on the track. The general nature of the danger to be apprehended from the passing trains was so obvious that it could not but have engaged

the thoughts and attention of the plaintiff, or of any man in that employment. He knew that his very life depended upon looking out for and keeping out of the way of any trains that might pass over the road. While his testimony is to the effect that he supposed that all were regular trains, it is hardly credible that he should have labored daily for more than three months on the track where one-third of the trains were irregular, and of the running of which he could not have been regardless, without having learned this fact. The times and manner of the running of them were to him the most important circumstances connected with his service, and to which the consciousness of his danger from that source must have directed his attention from the very first. It was *the* great and perfectly obvious danger connected with that service. And not only was he placed under the immediate and obvious necessity of attending to this matter for his own safety, but he was compelled to be observant of the times of passing trains in order that the track might be in a condition to allow them to pass without danger to the trains and to passengers. The plaintiff testified that a part of the time he was engaged putting in new ties, and that this could not be done when trains were passing. (The section crew were provided with signals and torpedoes to arrest trains when necessary.) Again, the plaintiff must have been aware of the impossibility of even regular trains always running on schedule time, and that an accident or a storm might at any time necessarily lead to the running of trains without regard to schedule time. Such considerations lead to one or the other of these two conclusions: either he must have observed the times of running the trains,—in which case he must have discovered that a considerable proportion were not regular, but extra and irregular trains,—or, if he did not give diligent attention to the subject, then he failed to exercise that common degree of care which the known and constant danger of his situation required him to exercise for his own protection. In either case he was not entitled to recover. But notwithstanding the plaintiff's testimony, to the effect that he did not know that irregular trains were run, the incredibility of this testimony is not only suggested by the considerations to which we have referred, but also by his other testimony. He says that "when we were on the hand-car

we *always* kept a lookout for trains;" and that on this occasion, although these men were expecting a freight train from the west, they also kept a lookout to the eastward to see whether a train might be coming from that direction. "Hag and I kept a lookout in that way." By his own testimony it would seem that the plaintiff's conduct was regulated by the consciousness or understanding that an irregular train might come from the east, as this engine and snow-plough did. Upon the whole case, we think it so clear that the plaintiff must have been deemed to have known this danger, and to have assumed the risk, or else that he was chargeable with negligence in not having observed it, that the court was justified in refusing to present the case to the jury.

Proof of the custom of this defendant, and of other railroads generally, to run trains at irregular times and without special notice, was relevant to the issue in this case, and was competent. Proof of the general custom was competent in support of the claim that this was not negligence. The practice of this company was competent for it tended to show that the plaintiff, after so long a period of service, must have learned of this practice, and this was one of the risks of his employment.

The defendant offered in evidence its train record, showing the number of trains, regular and extra, run over the road at the time in question. The plaintiff expressly admitted that this was "the record of the trains," but objected to its admission "on the ground that it was incompetent, irrelevant, and immaterial for the purpose of justifying the defendant in committing the injury complained of, or for any purpose." The assignment of error in respect to the admission of this evidence cannot be sustained. The fact sought to be thus proved was material and relevant, for reasons appearing in the former part of this opinion. The express admission of the plaintiff, and the form of his objection, may be fairly regarded as a waiver of any objection based upon the fact that qualifying proof had not been presented to justify treating the record as admissible evidence of the facts there entered. It would naturally be so understood by adverse counsel and by the court.

Order affirmed.

PETER DOYSCHER vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY.

June 9, 1890.

Railway—Fire Set by Engine—Evidence.—Finding that a locomotive was in a defective condition, so as to permit fire to escape, *held* sustained by the evidence.

Appeal by defendant from an order of the district court for Jackson county, refusing a new trial after verdict of \$90 for plaintiff.

Andrew C. Dunn, for appellant.

T. J. Knox, for respondent.

DECKINSON, J. This is an action to recover for property destroyed by fire set from one of the defendant's locomotives. The plaintiff recovered a verdict, and a new trial was refused by the district court. The principal question presented on this appeal is whether the special finding of the jury, that this engine was not properly constructed and equipped so as to prevent the escape of fire, was sustained by the evidence. The defendant's point, that this was not an issue in the case, is not sustained. We deem it to have been fairly within the allegations of the complaint; and, more than that, it appears from the case to have been treated by the parties at the trial as a matter in issue. Upon this point, it must be conceded that a strong case was made on the part of the defendant, and that, if it had not been met by any opposing proof bearing upon the question, the statutory presumption of negligence would have yielded to the case thus made. We need not refer to the defendant's evidence, except to say that it went to show that the engine was in good condition; that the wire netting on the smoke-stack was like a piece of netting which was exhibited to the jury, and the meshes of which, a witness stated, were three-sixteenths of an inch across; and that this was the standard netting commonly used for such purposes. The ash-pan was provided with netting also, in addition to the ordinary dampers. The fuel used was soft coal. The fire started at a point 86 feet from the track. It would seem, from

the evidence of the plaintiff's witness Dunn, and of the defendant's section foreman, that the place where it started was apparent, or was accurately ascertained; and the latter measured the distance. Dunn testified, in substance, that, at that point where the fire started, he found a coal cinder, which, according to his estimate of its size, given to the jury, was so large that it could not have passed through the netting with which, according to the defendant's evidence, the smoke-stack was covered, if it was in good condition. That the fire was set by a coal or spark thrown from the engine is beyond dispute. While the reading of the evidence of this witness does not satisfy us that it was entitled to very great weight, yet the credibility of the witness and the effect of the evidence, in view of the interest which the defendant's witnesses may be deemed to have had in testifying as to the condition of the engine, were so far matters for the consideration and judgment of the jury that, in the opinion of the majority of the court, the verdict, sanctioned by the refusal of the trial court to disturb it, ought not to be set aside by us. The alleged defect in the plaintiff's case in chief was supplied by the defendant, and cannot now avail the latter. *Cole v. Curtis*, 16 Minn. 161, (182.)

Order affirmed.

ELLA M. MOORE vs. HORACE G. NORMAN.

June 9, 1890.

43	438
45	49
43	428
52	86
43	428
63	483

Chattel Mortgage—Tender after Maturity—Discharge of Lien.—Tender of the amount due upon a promissory note secured by a chattel mortgage, though made after the note has matured, extinguishes and discharges the lien of the mortgage.

Same—Tender not Kept Good.—It is not necessary to keep the tender good by bringing the money into court in case an action is thereafter brought by the mortgagee to obtain possession of the chattels.

Same—Proof Requisite.—In such a case, however, the proof should be clear that the tender was fairly made, and deliberately and intentionally

refused by the mortgagee; that sufficient opportunity was afforded for the latter to ascertain the amount due; and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered.

Action brought in the district court for Jackson county, to recover possession of certain described cattle of the value of \$230, claimed by plaintiff as purchaser at sales on two chattel mortgages executed to him by defendant. Defence, usury in one of the mortgages, and tender, before sale, of the amount due on both mortgages. At the trial, before *Perkins, J.*, the plaintiff had a verdict for recovery of all the cattle except three calves, which the jury found the defendant was entitled to. A new trial was refused, and the defendant appealed.

Geo. W. Wilson, for appellant.

T. J. Knox, for respondent.

COLLINS, J. Action of claim and delivery, brought by a mortgagee against a mortgagor, to recover possession of certain domestic animals. Mortgages had been given upon distinct property to secure separate notes. By the verdict of the jury the animals described in one of these mortgages were awarded to plaintiff, while those covered by the other were held to belong to defendant. Under the charge of the court, this conclusion must have been reached by determining that one of the notes was tainted with usury, and hence the mortgage securing it invalid, while the other was not. By this charge there was excluded from the consideration of the jury all testimony in reference to tenders made by the defendant mortgagor after he had defaulted in his payments, and just prior to the commencement of this action. In substance, this testimony was that defendant, in due form, had twice tendered to plaintiff in payment of his notes a sum of money differing in amount each time, and that on each occasion the tender had been rejected; and that he had thereafter retained the money so tendered in his possession, ready for the plaintiff should it be called for, until after the property in dispute had been sold upon a foreclosure of the mortgages. The fact of these tenders, and the amount of each, seems undisputed; the real difference between the parties being as to the balance then remaining due and unpaid upon the defendant's notes. The sole reason given by plaintiff for refusing to accept the money offered by defendant was that it was insufficient

in amount. The defendant in his answer averred a readiness to pay the balance which he admitted and alleged to be due on his notes, and averred, further, that he brought this sum into court for plaintiff, but there was no actual deposit or offer to deposit the amount in court. Upon the other hand the testimony, as before stated, showed that the money was kept by defendant but a few days, until the property was sold on foreclosure. The position of the court below, taken upon the trial, and also when it refused to allow the motion appealed from, was that the defendant should have kept his tender good by bringing the money into court for payment to the plaintiff, should it have been determined by the jury that it was sufficient in amount.

The question before us—the effect of a tender made subsequent to default in the conditions of a mortgage—has never been presented to this court. In *Balme v. Wambaugh*, 16 Minn. 106, (116,) it was assumed, expressly for the purposes of a consideration of that case, that a sufficient tender of the debt on the law-day, and a refusal to accept, discharged the lien of a mortgage upon real property, although the tender was not kept good. The subject of tender, in case of a debt secured by chattel mortgage, was also referred to in *Coffin v. Reynolds*, 21 Minn. 456; *Ferguson v. Hogan*, 25 Minn. 135; *Norton v. Baxter*, 41 Minn. 146, (42 N. W. Rep. 865;) *Reisan v. Mott*, 42 Minn. 49, (43 N. W. Rep. 691.) But the necessity of keeping the tender good by payment of the money into court when the mortgagee, refusing, after condition broken, to accept it, commences a possessory action for the mortgaged property, is now the question to be determined.

At common law, where it was held that a mortgage upon real property was a grant of the land, defeasible only on the condition subsequent of paying the money at the exact time specified, (on the "law-day," as it was then termed,) it was well settled that a tender and refusal upon the law-day extinguished the lien of the mortgage, although the debt remained. But in case the money was not tendered when due, upon the exact day, the estate vested absolutely in the mortgagee. Even payment and acceptance thereafter did not revert the estate in the mortgagor without a reconveyance from the mortgagee. In case of a tender and refusal after maturity of the debt, the lien was not extinguished, nor the character of the mortgagee's estate

changed. The mortgagor's only remedy was in equity, by a bill to redeem. It was settled at an early day in the state of New York, in opposition to the ancient doctrine, that a mortgage upon real property was a mere security or pledge of the land covered by it for the money borrowed or mentioned in it; that the mortgagor remained the owner of the estate, entitled to its possession until divested by foreclosure; and that an acceptance of the amount due on the mortgage, at any time prior to a foreclosure, discharged the incumbrance on the land, precisely as an acceptance of the amount for which personal property was held discharged the pledge. With this view of the law in regard to real-estate mortgages, came the contention that no sound distinction could longer be maintained between a tender and refusal upon the due or law day, and a tender and refusal upon any day thereafter, prior to foreclosure; and in *Kortright v. Cady*, 21 N. Y. 343, it was held that a tender of the money due on a real-property mortgage, at any time before foreclosure,—though made after the law-day, and not kept good,—extinguished and discharged the mortgage lien. This doctrine in regard to real-property mortgages has been steadily adhered to in the state of New York, and with the common law correctly stated, as it has been, in respect to the sweeping effect of a tender made upon due-day, it is difficult to see what distinction can now be suggested, when considering the force and effect of a tender made upon the law-day and one made thereafter. We are positive none can be pointed out which possesses any real merit. And the doctrine announced in the *Kortright Case* has been adopted elsewhere, without regard to the character of the security, whether real or personal. *Flanders v. Chamberlain*, 24 Mich. 305; *Bartel v. Lope*, 6 Or. 321. But in *Noyes v. Wyckoff*, 30 Hun, 466, it was held inapplicable in the case of a chattel mortgage because of the difference in structure and effect between such a security and a mortgage upon real estate; the latter being a lien only, and conveying no title to the land, while the former transferred the title at once, subject to a defeasance by performance of the conditions annexed, the payment of the debt. On appeal, this case was affirmed on another point. 114 N. Y. 204, (21 N. E. Rep. 158.)

The character of the real-estate mortgage, and the *status* of the

lands covered thereby, are the same in this state under our statutes as they were declared to be by the courts of New York many years ago, while the same distinction between chattel mortgages and those upon real property exists here as it does there; for it has been announced repeatedly in the decisions of this court that the former vests in the mortgagee a defeasible title in the mortgaged property, and upon default he is entitled to possession without foreclosure, unless stipulated to the contrary, subject to the mortgagor's right of redemption. There has been of late years considerable legislation upon the subject of chattel mortgages, with a view to guarding and protecting the rights and interests of the mortgagor. Although technically the legal title to the mortgaged property is vested in the mortgagee, he has been deprived of many of the rights which formerly resulted from that rule of law. He cannot arbitrarily and unreasonably take possession of the chattels prior to the time the mortgagor is in default in his payments. Unless power to sell is granted by the mortgage, a foreclosure thereof must be made by service of a notice of intent to foreclose, the foreclosure becoming complete at the expiration of 60 days, and, pending these proceedings, it does not seem to be absolutely essential that possession should be taken by the mortgagee. If by the terms of the mortgage a sale be authorized as a method of foreclosure, it must be public and after due notice as prescribed by the statute. Until the foreclosure is complete, either by service of the notice of intention to foreclose and the expiration of the period of 60 days thereafter, or by a public sale of the property under the terms of the mortgage, the right to redeem is fully recognized and protected. If the mortgagee has reduced the possession to himself, a tender before actual sale, and a refusal to accept the amount due, with costs, if any there be, confers upon the mortgagor the right to maintain replevin or claim and delivery for the property. Now, all of these salutary provisions of the statutes (Gen. St. 1878, c. 39; Laws 1879, c. 65; Laws 1885, c. 171,) have had a practical effect upon the rule of law that the legal title to the mortgaged chattels vests in the mortgagee, and that he is entitled to possession thereof upon default of the annexed conditions. It still exists, and for obvious reasons, not apparent in cases where real

property has been mortgaged, will continue to exist. But in truth very little difference can be pointed out between the rights, privileges, and remedies of the mortgagor of real and personal property, either in the structure of the mortgage or its effect. As against third parties, one must be filed, the other put upon record; as to either, redemption may be made after default, upon payment of the debt secured thereby within a specified interval of time, denominated, in each case, a "period for redemption." The same kind of an instrument, a certificate in writing, (executed with more formality in case the security is upon real than if it be upon personal property,) releases and discharges either. The distinction is therefore more in theory than in practice. If this be so, why should a different effect be given a tender made of the amount of a debt in the one case than in the other? We can discover no reason for a distinction which commends itself, and no reason is suggested in the decisions cited by respondent, except that based upon the technicality before referred to, that a mortgage upon real estate is a mere lien, while a mortgage on personal property vests the legal title thereof in the mortgagee. This is not satisfactory, and, in analogy with the rule laid down in case of real-estate security, which is well supported on principle and by authority, we are of the opinion that the effect of a tender of the amount of a debt secured by a chattel mortgage, though made after maturity, is to extinguish and discharge the lien, the debt only remaining; and that it is not necessary to keep the tender good by depositing the money in court, in case an action is thereafter brought by the mortgagee to obtain possession of the chattels.

It is urged in some of the cases, where a different conclusion has been reached, that the adoption of this rule must work great hardship and injustice to the mortgagee, frequently causing a loss of the entire debt; but certainly, in this respect, the rule will not be more unjust when invoked as to chattel than when governing a real-property mortgage, or than when it is applied, as it always has been without hesitation, in the case of a pledge. See *Norton v. Baxter, supra*, and cases cited. As was said in the *Kortright Case*, it is not perceived how the mortgagee is to be embarrassed by the establishment of this rule. If the mortgagor does not tender the full amount due,

the lien of the mortgage is not extinguished, and he runs no risk in accepting it. If, upon the other hand, it is sufficient in amount, his debt is paid, and that is all he has any right to demand. It is his own folly if he attempts to exact more. But, in view of the serious consequences which might possibly result from a refusal to accept such a tender, the proof should be clear that it was fairly made, deliberately and intentionally refused by the mortgagee, that sufficient opportunity was afforded to ascertain the amount due, and that a sum sufficient to cover the whole amount due was absolutely and unconditionally tendered. *Tuthill v. Morris*, 81 N. Y. 94. See, also, upon the sufficiency of a tender, *Storey v. Krewson*, 55 Ind. 397; *Wilder v. Seelye*, 8 Barb. 408; *Ocean Nat. Bank v. Fant*, 50 N. Y. 474; *Nelson v. Robson*, 17 Minn. 260, (284.) As the character of the tender, whether conditional or otherwise, and its sufficiency as to amount, should have been submitted to the jury, under proper instructions, the trial court erred in its ruling, and a new trial must be had.

Order reversed.

43 434
59 389

JONAS GUILFORD vs. WESTERN UNION TELEGRAPH COMPANY.

June 9, 1890.

Former Judgment—Privies.—A judgment in a former action wherein this respondent was defendant, and the appellant's assignor plaintiff, *held*, to bind the plaintiff in this, and to prevent a recovery by him.

Appeal by plaintiff from an order of the district court for Hennepin county, refusing a new trial after a trial by *Young, J.*, without a jury. At the trial, the record of the former action in the same court (which is mentioned in the opinion) was in evidence. That action was tried, without a jury, by *Lochren, J.*, who found as facts the existence of defendant's rule requiring indemnity before issuing new certificates in place of lost certificates, and plaintiff's refusal to comply with such rule, on the ground that it was unreasonable. He also

found that the plaintiff in that action was the owner of the certificates; that he lost them the day they were issued to him; that he had never indorsed or otherwise assigned them; that he at once notified defendant of the loss; that the certificates have never been found; and that plaintiff continued to be the owner of the shares represented by the certificates. As conclusions of law he held the rule of the defendant to be reasonable, and that "the plaintiff, having refused to comply therewith, has no cause of action," and the defendant thereupon had judgment on the merits. In the present case it appeared that defendant had offered to plaintiff to issue to him new certificates on his furnishing the indemnity required by its rule, which plaintiff had refused to do. The above-mentioned rule requires an indemnity bond in double the par value of the shares represented by the certificates, with two sureties, each worth double the par value of the shares for which the new certificates are issued. In the present case the court held the rule to be reasonable, and that plaintiff could not recover without a compliance with it,—following the ruling in the former action.

Jonas Guilford, appellant, *pro se*.

Ferguson & Kneeland, for respondent.

COLLINS, J.¹ This action was brought to adjudge and declare the plaintiff a stockholder in defendant corporation, and the owner of certain shares of its capital stock, to compel defendant to make such entries upon its books as would transfer to plaintiff said stock, and also to compel the defendant to issue and deliver to plaintiff, as owner of said stock, certificates representing and evidencing said shares of stock in place of 12 certificates issued by defendant in the month of February, 1882, to one Asa Guilford, for the same purpose, and which, plaintiff claims, were accidentally lost by said Asa Guilford on the day they were issued. The plaintiff claims to have succeeded to the interests of Asa Guilford in the stock and stock certificates, by virtue of a bill of sale transferring and conveying the same to him. The certificates have never been in plaintiff's possession, and, so far as is known, have never been found since their loss. From the pleadings,

¹Vanderburgh, J., took no part in this case.

evidence, and findings, it is manifest that, as between the parties, there is very little dispute over the facts; the main controversy being as to defendant's right to require, in accordance with one of its rules and regulations in such cases, a bond of indemnity, in double the par value of said shares of stock, as a condition precedent to the issuance and delivery of new certificates in lieu of those alleged to have been lost.

Among other matters set forth in defendant's answer was a judgment in its favor, duly entered on the 15th day of August, 1883, and upon the merits, in a suit then pending for this same cause of action, wherein said Asa Guilford was plaintiff, and the present respondent the defendant, which judgment remains in full force and effect. The pendency of such a suit, and the entry of the judgment, were admitted in the reply; but the plaintiff attempted to evade the force and sufficiency of the allegations as a plea in bar by averring the legal effect of the judgment to have been different from that claimed for it in the answer. The only perceptible difference in the cases is that, in the former, Asa Guilford, then owner of the shares of stock, was plaintiff, while, in the present one, Jonas Guilford, who purchased from Asa in 1883, is plaintiff. The reply was insufficient to put the allegations of the answer in respect to the judgment in issue. It failed to deny them, nor did it state any facts from which it might appear that the judgment was not exactly as alleged. With this condition of the pleadings, no finding of fact as to the former judgment was necessary, for the defendant was entitled to judgment on the pleadings. The judgment in the prior action, wherein Asa Guilford—with whom this plaintiff is in privity—was plaintiff, and the respondent corporation defendant, was and is a complete bar to a recovery here. It was final and conclusive of every matter coming within the legitimate purview of the original action, both in respect of matters of claim and of defence. It directly decided a point that was material in the former action, and is in litigation in this. It bound the parties and those in privity with them, by way of estoppel. *Dixon v. Merritt*, 21 Minn. 196; *Harris v. Harris*, 36 Barb. 88. Hence, the merits of this controversy need no examination.

Order affirmed.

A motion by plaintiff for a reargument was denied July 3, 1890, at which time the following concurring opinion was filed:

MITCHELL, J. I think the lapse of time after the alleged loss of stock certificates without their being heard from may be so long as to amount to almost conclusive evidence that they are no longer in existence, and hence justify the court in compelling the corporation to issue new ones without any bond of indemnity. Therefore, after a re-examination of this case upon the motion for reargument, I am not entirely clear that a judgment requiring the corporation to issue new certificates, upon condition that a bond of indemnity is first given, is a bar to a subsequent action to compel it to issue them without any indemnity. Hence I prefer to affirm on the ground that this case was rightly decided by the trial court on the merits; that the lapse of time is not yet so great as to exclude danger of the reappearance of the old certificates, and therefore that the defendant ought not to be compelled to issue new ones, in place of those alleged to have been lost by plaintiff's assignor, without its being fully indemnified. The stock being, according to the terms of the certificates, transferable on the books of the corporation only upon their surrender, its liability in case of their reappearance in the hands of a *bona fide* holder is a matter of serious moment, according to the drift of modern authorities, especially the federal courts and the courts of New York, where the defendant corporation is domiciled. *Bank v. Lanier*, 11 Wall. 369, 377; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Mor. Priv. Corp.* § 188.

43	438
57	300
43	438
175	345

STATE OF MINNESOTA, *ex. rel.* W. C. Nash, *vs.* CHRISTIAN MADSON.

43	438
85	171

June 9, 1890.

Constitution—Act Embracing more than One Subject—Expression in Title.—An act of the legislature is not repugnant to the provisions of section 27, art. 4, of the constitution, because it embraces, technically, more than one subject, (one of which only is expressed in the title,) so that they are not foreign and extraneous.

Same—Expression of Objects of Acts.—It is not important that all of the various objects of an act be expressly stated in its title, or that the act itself indicates objects other than that so mentioned: provided they are not at variance with the one so expressed, but in consonance therewith.

Same—Amendatory Act—Title.—The sufficiency of the title of an amendatory law to justify the legislation under it depends not alone upon the comprehensiveness of the title, but also upon the nature and extent of the enactment, to amend which is the office and declared purpose of the later act.

Same—Amendment of Section of Act.—If an amendment is not foreign to the title of the original statute, it makes no difference whether it is cognate to the section amended.

Same—Act Amending City Charter.—The subject-matter found in Sp. Laws 1889, c. 25, § 6, is sufficiently expressed in the title to the act; and no more than one subject is embraced therein.

Mandamus, brought in the district court for Polk county, by the relator, treasurer of school-district No. 3, in that county, to compel the respondent, treasurer of the city of East Grand Forks, to pay over to him the sum of \$3,710, received by respondent, as such city treasurer, in payment for licenses for the sale of intoxicating liquors in the city. The relator appeals from an order of *Mills, J.*, quashing the writ.

P. C. Schmidt, for appellant.

H. Steenerson, for respondent.

COLLINS, J. The only question presented by this record which we need to consider at length, is whether section 6, c. 25, Sp. Laws 1889, is invalid and ineffectual because the subject thereof is not expressed

in the title of the act, or because more than one subject is embraced in the law. It is entitled "An act to amend an act entitled 'An act to incorporate the city of East Grand Forks in Polk county,' approved March 7, 1887," and the respondent's claim is that it is repugnant to the provisions of section 27, art. 4, of the state constitution,—an article which has been discussed and passed upon by this court time and time again.

Section 6, involved in this litigation, reads as follows: "Sec. 6. Chapter 3 of said act is hereby amended by adding thereto the following section: 'Sec. 15. Nine-tenths (9-10) of all money heretofore received and now on hand, or which hereafter shall be received by said city in payment of liquor license, shall be turned into the treasury of school-district number three (3) in said county, to be used for the support of schools maintained in said district.'" It will be noticed upon examination of the law of which chapter 25, *supra*, was amendatory, (Sp. Laws 1887, c. 45,—the original act incorporating the city of East Grand Forks,) that subchapter 3 of the same is wholly devoted to other matters than licenses, or the regulation of the liquor traffic; that its last section is numbered 15, as is the amendment under discussion; and that the subject-matter of the section has no relevancy to that which precedes it,—is quite as foreign to the subjects previously provided for as is the matter covered by the amendment. It will also be observed that, in the original enactment, no reference is made to school-districts or schools whatever, and also that no special disposition is made of the money which may be derived from the issuance of liquor licenses. Necessarily, it went into the city treasury for general purposes. In fact it is contended by counsel for the respondent that, had the original act contained the provision now complained of, it would have been unconstitutional for either of two reasons: *First*, because embracing more than one subject, namely, the subject of a municipal government and the maintenance of public schools in district No. 3; and *secondly*, because the subject of schools was not expressed in its title.

Whether an act of the legislature contains matter different from that which is expressed in the title, or refers to more than one subject-matter, is not at all times easy of solution, and it is extremely dif-

ficult—is well-nigh impossible—to lay down any general rule by which this can always be determined. None, except that in each case the real subject of the enactment in question, and whether the provision is properly germane to and is fairly expressed in the title, a liberal, rather than a strict rule of construction, in favor of the law, always being observed, has ever been attempted by this court in the numerous cases of this character which have heretofore been before it. There is no doubt in our minds but that this provision in reference to license-money could have been incorporated in the original act without violating the fundamental law of the state. The object of chapter 45, *supra*, as expressed in its title, was to create a municipal government for certain specified territory; and what valid objection could have been urged had the legislature therein provided for the establishment and support of public schools? These institutions are an important feature in every municipality. They are part of them, closely connected in many ways, using the municipal officers and machinery in the levying and collecting of their revenues, and frequently, as will be seen upon examination of the various charters in this and other states, fully recognized as a legitimate object of legislation when dealing with the subject of municipal government. So that, had the original enactment covered the matter of public schools, its title would have been ample, and the act itself not open to the charge that more than one subject was embraced in it. Indeed, it matters not that an act embraces, technically, more than one subject one of which only is expressed in the title, so that they are not foreign and extraneous. Nor is it important that all of the various objects of an act be expressly stated in its title, nor that the act itself indicates objects other than those mentioned, provided they are not at variance with the one so expressed, but are consonant therewith. *State v. Cassidy*, 22 Minn. 312.

The court below, when granting the alternative writ of *mandamus* herein, seems to have conceded these several propositions, but to have acted upon the assumption that the subject-matter of the amendatory law was not treated or considered in the original, and hence, under the reasoning in *State v. Smith*, 35 Minn. 257, (28 N. W. Rep. 241,) the amendment could not be sustained. A reading of the *Smith*

Case will show that the original and amendatory acts therein considered were so unlike, in nature and effect, those now under discussion that the decision has very little application to the case at bar. But it was therein stated that the sufficiency of the title of an amendatory law to justify the legislation enacted under it, depends not alone upon the comprehensiveness of the title, but depends also upon the nature and extent of the enactment, to amend which is the office and declared purpose of the later act. What was the nature and extent of the law of 1887? It provided, among other things, for regulation of the liquor traffic, and for the licensing of places in which spirituous liquors might be sold. It was ample and complete upon the subject-matter of liquor licenses. Through this provision of the charter, sums of money were to be obtained,—license fees; and this money, in the absence of any specific direction to the contrary, went into the city treasury for general purposes, as before stated. Supposing that, in the original act, there had been an appropriation of nine-tenths, or more or less, of these moneys, for some particular purpose, such as for building bridges, or purchasing grounds for parks, would it have been urged that such an appropriation could not have been made without infringing upon section 27, art. 4, of the constitution? Clearly, it could not have been, upon principle or authority. And, if this be so, why does an objection have force because there was no specific appropriation of these moneys to some particular object or purpose? The subject-matter dealt with in the original act is precisely the same subject-matter dealt with by the amendment, namely, the disposal of such moneys as shall be derived from licenses issued under the provisions of the earlier law. The amendment simply diverted a portion of these moneys from the city treasury, into which they went under the terms of chapter 45, into the treasury of the school-district. It may be true that, when considering the various sections of said chapter, the legislators did not reflect upon or discuss the matter of furnishing money to support public schools. But they undoubtedly did consider the subject of liquor license, and the disposition of the funds to be received therefrom; and this subject is all that was considered or legislated upon in the amendatory act.

The fact that this amendment is attached to a chapter in the city

charter which does not refer to the subject of licenses, or that there was already a section of that chapter numbered 15, is of no consequence. It may indicate careless legislation, but that is all. If an amendment is not foreign to the title of the original statute, it makes no difference whether it is cognate to the section amended. *Underwood v. McDuffee*, 15 Mich. 361.

The order appealed from must be reversed, and the case is remanded with directions that a peremptory writ of *mandamus* issue as prayed for.

Order reversed.

JOHN F. MCCARTHY and another *vs.* JENNIE CALDWELL and Husband, impleaded, etc.

June 9, 1890.

Mechanic's Lien—Authority of Husband to Charge Wife's Property—Evidence.—A husband having contracted to have the plumbing done in a house being constructed by his wife, and owned by her, and the issue being as to whether he acted by her authority, so that her property might be charged with a lien, it was error to exclude proof that the wife saw and conversed about the plumbing while it was being done; the statute making her knowledge and consent evidence of her authority.

Action to enforce a mechanic's lien for \$410 and interest. Plaintiffs appeal from an order of the district court for Hennepin county, refusing a new trial after a trial by *Hicks, J.*, and a dismissal ordered at the close of plaintiffs' case.

Welch, Botkin & Welch, for appellants.

Davenport & Thian, for respondents.

DICKINSON, J. Action to enforce a mechanic's lien upon real estate owned by the defendant Jennie Caldwell, who is the wife of the defendant E. P. Caldwell. The work for which the lien is claimed consisted of the plumbing in a house which was being constructed under a contract with Mrs. Caldwell. The plumbing, however, was not included in the contract for building made by her. Her husband alone

contracted with the plaintiffs to put in the plumbing; but it was an issue in the case whether this was on his own account or whether he acted as agent for his wife. The testimony on the part of the plaintiffs went to show that during the progress of the work, and when it was about one-third done, Mrs. Caldwell was in the house and saw some of the plumbing work which had then been put in; that one of the plaintiffs conversed with her regarding payments, when she gave assurances that payment would be made as soon as the work should be done; and that subsequently she joined with her husband in a note and mortgage to be given to the plaintiffs for the amount then unpaid. The account for material and labor was charged to her by the plaintiffs. In her defence, Mrs. Caldwell denied having the alleged conversation with one of the plaintiffs, declared that she did not know that her husband had ordered the plumbing to be done, and that she knew nothing about it; that she had no knowledge that the plaintiffs did it, or that it was to be done, or that it was being done. In rebuttal, one Crum, a witness, testified on the part of the plaintiffs that, during the progress of the plumbing work, he saw Mrs. Caldwell in the house, and conversed with her about some of the work already put in, concerning which she made inquiries and remarks expressive of approval. Upon the motion of the defendant, this testimony was stricken out on the ground alone that it was immaterial and irrelevant, no objection being made to the order of the proof.

Apart from the evidence which was thus stricken out, the case would have justified the conclusion that this labor and material were furnished with the authority, knowledge, and consent of the wife; but the court found to the contrary. The evidence of the witness Crum was relevant and material. It went to show Mrs. Caldwell's knowledge that the work was being done while it was in progress, and that she consented to it. Our statute declares, with respect to labor or material which may be the subject of a lien, that, whenever the same is furnished "by or with the knowledge and consent of a married woman, who is the owner of the property benefited thereby, upon the order of her husband, such knowledge and consent shall be sufficient to establish that such husband acted therein as the

agent of the wife." Laws 1883, c. 43; Laws 1885, c. 46. Under this rule of evidence, this testimony should not have been stricken out or disregarded. For this reason the order refusing a new trial is reversed.

STATE OF MINNESOTA *vs.* PATRICK WALSH.

June 9, 1890.

Statute—Construction of Penal Act.—An act is not made criminal by statute unless the intention to do so is apparent in the law, beyond serious doubt.

Same—General following Specific Words.—Where, in a statute, words particularly designating specific acts or things are followed by and associated with words of general import comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated.

Same—Injury to Railway Structures—Fences.—A statute making it criminal to displace, remove, or destroy "a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or *structure* appertaining to or connected with a railway," *held* not applicable to structures—as a fence—not constituting any part of the railroad proper.

Appeal by defendant from an order of the district court for Goodhue county, *McCluer*, J., presiding, refusing a new trial.

J. C. McClure, for appellant.

Moses E. Clapp, Attorney General, and *F. M. Wilson*, for the State.

DICKINSON, J. The defendant was convicted under an indictment for the act of cutting and removing a section of fence on each side of a strip of land occupied by a railroad company for its railway track across the defendant's land. The fence had been constructed by the railroad company to inclose the land thus occupied by it. The defendant appears to have removed the fences to facilitate the driving of his stock from one part of the farm to another. On the part of the state, it is only claimed that the act of the defendant was crim-

inal by force of section 476 of the Penal Code, which, so far as need be here recited, declares that "a person who (1) displaces, removes, injures, or destroys a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or structure, or any part thereof, attached or appertaining to, or connected with a railway, whether operated by steam or by horses, * * * is punishable as follows;" the prescribed penalty making the prohibited acts felonies.

The application of two well-settled and familiar rules of construction exclude the act of the defendant from the operation of this statute.

A statute is not to be deemed to make an act criminal, which would not have been so except for the statute, unless the intention of the legislature to effect that result is apparent, and not seriously doubtful; and if, applying the proper principles of construction to ascertain the intention of the legislature expressed in the law, it remains fairly doubtful whether it was intended to embrace acts or conduct like that under consideration, such acts or conduct must be regarded as not within the statute.

It is a principle of statutory construction, everywhere recognized and acted upon, not only with respect to penal statutes, but to those affecting only civil duties and rights, that, where words particularly designating specific acts or things are followed by and associated with words of general import, comprehensively designating acts or things, the latter are generally to be regarded as comprehending only matters of the same kind or class as those particularly stated. They are to be deemed to have been used, not in the broad sense which they might bear if standing alone, but as related to the words of more definite and particular meaning with which they are associated. Numerous illustrations of this rule of construction are given in *Endlich, Interp. St. § 400 et seq.* The rule is too familiar to require a selection from the multitude of decisions for the purpose of citation.

The only language of this law which is claimed to embrace a fence inclosing a right of way of a railroad is the general word "*structure*," following the words of particular, definite import, "rail, sleeper, switch, bridge, viaduct, culvert, embankment." It will be observed that all the things thus specifically mentioned are parts of the railroad

proper, over which trains are operated. In this respect, they are all of one class; and it is easy to see why the legislature made it a felony to displace, remove, injure, or destroy any of these. The fences bounding and inclosing the land used for railroad purposes are obviously not *ejusdem generis* with the things thus specified, constituting parts of the railroad proper, and, under the rule to which we have referred, cannot be regarded as included in the general term "structure." Aside from the language which we have recited, there is nothing in the nature of the case to oppose the application of the general rules of construction to which we have referred. As we have said, the things particularly stated are of one kind or class,—that is, all are parts of the railroad; and the safety of every train that may pass over the road is necessarily and immediately dependent upon the condition of these things. The fences along the road are not a part of the road-bed, and affect the safety of the trains only as they may prevent intrusion upon the railroad from the adjacent lands. The danger from an unauthorized interference with the fence is not the same as that from acts affecting the condition of the road and the track; and the construction of the act contended for by the state has not the support of the fact that the reason for the enactment was obviously the same, as respects the fences, as the road-bed and track. Of course, the word "structure," in this connection, may be of effect. It doubtless would embrace a trestle-work supporting the track, although it might not be properly designated by the word "bridge." It might include the earth road-bed under the track at a point where there was no "embankment." On the other hand, it would not include a section-house by the track used for housing a hand-car and the tools of the section-men, although such a structure would be distinctly within the express terms of the law.

The verdict must be set aside, and the cause remanded to the district court with directions to dismiss the prosecution.

EMERSON W. PEET vs. FRANK G. SHERWOOD and another.

June 9, 1890.

43	447
45	193
43	447
47	347

Broker to Obtain Loan—Commission, when Earned.—The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes to find a purchaser of property. He is entitled to his commissions when he has procured a lender ready, willing, and able to lend the money upon the authorized terms.

Same—Borrower to Make Good Title.—The borrower, when employing such a broker, always does so upon the implied conditions (if there be no express stipulation in respect to the matter) that he has the ability and will make or tender to the lender a title free from infirmity or defect.

Action brought in the district court for Ramsey county, to recover \$875 for services under an employment to procure a real-estate-mortgage loan. At the trial, before *Kelly, J.*, at the close of the evidence, each party moved that a verdict be directed in his favor. A verdict was directed for defendants, a new trial was refused, and the plaintiff appealed.

Ambrose Tighe, for appellant.

Warner & Lawrence, for respondents.

COLLINS, J. Plaintiff was a mortgage-loan broker, to whom defendants applied for a loan of \$20,000 upon a city lot. The application was in writing, upon a blank furnished by plaintiff, in which the lot was particularly described as to size and location. In reply to one of the printed questions, defendants stated that the lot was free and clear of all liens and incumbrances, except "\$16,825, to be clear." Thereupon plaintiff undertook to secure the required amount from eastern parties. A few days later, upon being informed that so large a sum could not be had upon the security offered, defendants agreed in writing with plaintiff, "when notified of an acceptance of their application for a loan," to pay to him "the sum of 2 per cent. on face of loan dollars for his services, provided the loan is made for \$18,500." It was further agreed between the parties, upon discovering that plaintiff's correspondent, a corporation, would loan

no more than \$17,000 upon the property, that it should be secured by a first mortgage for that amount, while plaintiff himself should furnish the balance of \$1,500, to be secured by a second mortgage. The plaintiff stood ready to fulfil his agreement, and the corporation had agreed to loan the \$17,000, when it discovered a defect in defendants' title, in the nature of an easement,—a private alley-way ten feet in width upon the side, and eight feet wide upon the rear, of the lot; and the corporation thereupon refused to proceed further. Had it not been for this defect, the loan would have been made. Upon account of it, and for this reason alone, the security was rejected. This action was brought by plaintiff to recover the amount of his commissions, precisely as if the negotiations had ended in the furnishing of the money. The trial court directed a verdict for defendants, and in so doing the court erred.

The rights and duties of a broker employed to secure a loan depend upon the same principles which govern the broker who undertakes to find a purchaser of property, and no substantial distinction can be made. The inquiries in each case are, what did the broker undertake to do? has he completed his undertaking? and, if not, is the difficulty and failure attributable to his own act, or that of the party by whom he was employed? The loan broker is entitled to his commissions when he has procured a lender who is ready, willing, and able to lend the money upon the authorized terms. This done, his duty is performed, and he is entitled to compensation whether the loan is consummated or not, unless his right thereto is, by special agreement, made to depend upon conditions which the law does not annex to his engagement as a broker. He assumes no greater or different obligation in respect to title in case of a loan than when employed to make a sale. The borrower, when employing a broker to procure or make a loan for him, always does so upon the implied conditions (if there be no express stipulation in respect to the matter) that he has the ability and will make or tender to the lender a title free from infirmity. It is not the broker's duty, and no part of his engagement, to remove incumbrances, or to cure defects in title, and, if the loan is not effected in consequence of an incumbered or defective title, he is entitled to his commissions. He has performed

his contract; the default is with the other party. *Vinton v. Baldwin*, 88 Ind. 104; *Holly v. Gosling*, 3 E. D. Smith, 262; *Doly v. Miller*, 43 Barb. 529; *Knapp v. Wallace*, 41 N. Y. 477; *Gonzales v. Broad*, 57 Cal. 224; *Green v. Reed*, 8 Fost. & F. 226; *Green v. Lucas*, 31 Law T. (N. S.) 731; *Mechem*, Ag. § 970.

Finally, it is argued that because, after discovering the existence of the alley-way, plaintiff urged, in a letter to the corporation, that the lot so incumbered was ample security for the amount of money required, and because, in the same letter, he stated that, if the loan was not effected, he could recover nothing for his services and disbursements in the transaction, he cannot prevail in this action. We are unable to see why he should be punished for attempting to convince his correspondent that it was in error when regarding the alley-way as seriously impairing the value of the lot. Nor can we understand why he is prevented from recovering in this action because he did not know, or, perhaps, misunderstood, his legal rights when writing to the corporation.

Order reversed.

NORTHWESTERN CEMENT & CONCRETE PAVEMENT COMPANY *vs.* NORWEGIAN-DANISH EVANGELICAL LUTHERAN AUGSBURG SEMINARY, impleaded, etc.

June 11, 1890.

Mechanic's Lien—Requisites of Description of Premises.—The description in an affidavit for a mechanic's lien is sufficient if it so points out the building, and the land on which it is situated, that they can be identified with reasonable certainty by applying the description to the land. It is not necessary to give the common name of the building. The essential thing is to describe it so that it can be identified, and if this be done it is a substantial compliance with the requirements of the statute.

Same—False Particular, when Harmless.—The rule of description, as in the case of deeds, is that, if the building and land be once sufficiently described, the addition of a circumstance false or mistaken will not vitiate the description.

v.43M—29

43	449
44	414
43	449
47	32
47	126

43	449
52	119
43	449
65	272

43	449
82	341

Same—Action by Subcontractor—Parties—Practice.—In an action by a subcontractor to enforce a lien, the original contractor is a necessary party. If he be named as a defendant in the title of the action, but not brought in as a party by service of the summons on him, the proper practice is for the court, upon the suggestion of the fact, to continue the action or delay the trial until he be brought in as a party. If the plaintiff has unreasonably delayed to make such service, a motion may be made to dismiss the action.

Appeal by plaintiff from a judgment rendered on the merits, in an action to enforce a mechanic's lien for \$217.35 and interest, brought in the district court for Hennepin county against the above-named defendant and J. J. Evans, and tried by *Rea, J.*

Charles A. Willard and *Henry W. Benton*, for appellant.

Ueland, Shores & Holt, for respondent.

MITCHELL, J. This was an action to enforce a mechanic's lien for materials furnished by plaintiff, as a subcontractor, to the defendant Evans, contractor, for the erection of a building for the defendant corporation; and the principal question is as to the sufficiency of the description of the building and land on which it is situate, in plaintiff's affidavit for a lien. The description is "a certain brick and stone building known as 'Augsburg Seminary,' situated upon a certain lot of land owned by [the defendant corporation,] described as 'Lots 5, 6, 7, and 8 in block 10, in Murphy's addition to Minneapolis, according to the recorded plat thereof on file in the register of deeds' office in and for Hennepin county.'" It also clearly appears, by implication, that the building referred to was erected on or subsequent to January 7, 1889, the date of furnishing the materials. This description is *prima facie* sufficient; and, if there is any latent ambiguity or defect, it must be made to appear by extrinsic evidence. The court finds that the defendant corporation contracted with Evans for the erection of a brick dwelling-house to be used as a place of residence for the professors at the Augsburg Seminary, and that plaintiff sold and delivered him these materials to be used in the construction of that building, and that they were in fact so used; that the building is a brick-veneered building, with stone trimmings, and is situated on lots 6 and 7, block 10, in Murphy's addition to Minne-

apolis, owned by the defendant corporation, and near one corner of the block; that at or near the other side of the block, and on the corner diagonally opposite, the defendant has a large brick-veneered building, with stone basement and foundation, which was erected some 16 years ago, and used as a seminary of learning, and well known by the name of "Augsburg Seminary;" and that there is no other building in Minneapolis known by that name. The court also finds that there was no evidence to show whether or not there is any other building than the brick-veneered dwelling on either of the four lots described in the notice for lien. It cannot be doubted that this sufficiently describes the land on which the building is situated. The fact that it includes more than the plaintiff is entitled to a lien on will not invalidate the lien. *North Star Iron-Works Co. v. Strong*, 33 Minn. 1, (21 N. W. Rep. 740;); *Smith v. Headley*, 33 Minn. 384, (23 N. W. Rep. 550.) The style of the building is also accurately described as "brick and stone." We think it affirmatively appears from the findings that the old building known as "Augsburg Seminary" is not situated on either or any of these four lots; and it does not appear that there is any other building on them except the one erected by Evans, the contractor, and for which plaintiff furnished these materials. The affidavit for a lien is neither a process, pleading, judgment, nor conveyance, but merely a notice of the claim of the mechanic or material-man; and, while it must undoubtedly, in substance, comply with the requirements of the statute, yet the same fulness or preciseness is not required as in the case of a conveyance or judgment. The general rule as to the sufficiency of such notices is that, if there appear enough in the description to enable a party familiar with the locality to identify the premises intended to be described with reasonable certainty, to the exclusion of others, it will be sufficient. It is enough that the description points out and indicates the premises so that, by applying it to the land, it can be found and identified. *Phil. Mech. Liens*, § 379. As was said in *North Star Iron-Works Co. v. Strong*, *supra*, all that the statute contemplates is that the building, and the tract of land on which it is situated, should be so described as to identify the building and its location. A remark is made in that case that might

seem to imply that it is necessary that the building should be described by its common name, but that must be construed in the light of the facts of the case then being considered. Many buildings have no common name, and can only be described by location and style of construction. The reference to the name of the building or its kind, contained in the form given in the statute, must be considered as merely suggestive of one way of describing it. The essential thing is that it be described so that it can be identified. If this be done, it is a substantial compliance with the statute, and the particular manner in which it is done is immaterial. In this state the important means of identifying real estate is, in the case of urban property, the description according to the plat, and, in the case of rural lands, the description according to government survey, and not the description of the buildings, or the streets on which they are situated. In this case the city lots on which the building is situated are accurately described. There is, as we must assume from the findings, no other building on them. There is no other building to which the description can apply, for the old building known as the "Augsburg Seminary" is not situated on these lots. In view of all these facts, there can be no doubt that the description used is sufficient to identify the property sought to be charged with the lien.

Had the expression "known as 'Augsburg Seminary'" been omitted, the description would have been undoubtedly good. But, even in the case of deeds, the rule of description is that, if the premises are once sufficiently described, the addition of a circumstance false or mistaken will not vitiate the description. *Adamson v. Petersen*, 35 Minn. 529, (29 N. W. Rep. 321;) *McAllister v. Welker*, 39 Minn. 535, (41 N. W. Rep. 107;) *Bailey v. Galpin*, 40 Minn. 319, (41 N. W. Rep. 1054.) If this is so in case of deeds, it certainly ought to be so in case of these notices. We think the description is sufficient.

It is suggested that Evans, the contractor, although named as defendant in the record, had never been made a party to the action, because he had not been served with the summons; that he is a necessary party defendant, and therefore the defendant corporation was entitled to judgment. Inasmuch as the contract relation between the owner and the original contractor, and the contract relation and state

of accounts between the original and subcontractor, must be adjudicated on before a lien can be established in favor of a subcontractor, and as a judgment in an action between the subcontractor and the owner would not be conclusive on the intermediate contractor, we think the better and proper rule is that, in an action by a subcontractor to enforce a lien, the original contractor is a necessary party defendant. The rule as to parties being not an inflexible one going to the jurisdiction of the court over the cause, but one introduced by the court itself for the purposes of convenience and justice, it is of course, in this as in other cases, susceptible of modification for these purposes according to the exigencies of the case. *Cockburn v. Thompson*, 16 Ves. 321; *Wiser v. Blachly*, 1 John. Ch. 437; *Elmendorf v. Taylor*, 10 Wheat. 152, 167; *West v. Randall*, 2 Mason, 181; Phil. Mech. Liens, § 397; *Emmet v. Rotary Mill Co.*, 2 Minn. 248, (286;) 2 Jones, Liens, § 1574. But the fact that the contractor is not made a party will not entitle the owner to a judgment on the merits. Where he is not named as a defendant in the title of the action, the defect of parties defendant must be taken by demurrer or answer. Where he is so named, but has not in fact been made a party by service of the summons, it may not be entirely clear how the defect can be taken advantage of. It certainly cannot be by demurrer, and there would seem to be difficulties in the way of requiring it to be done by answer. We think the proper practice is, when the plaintiff moves the case for trial, for the court, upon its attention being called to the defect, to continue the action or delay the trial until the contractor is brought in as a party. If the plaintiff has unreasonably delayed in making service of the summons on him, it might be good ground for a motion to have the action dismissed. *Johnson v. Robinson*, 20 Minn. 153, (170.)

Judgment reversed.

T. A. DRISEN, Administrator, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY.

June 11, 1890.

Railway—Injury Causing Death—Contributory Negligence.—*Held* that, upon the evidence in this case, the negligence of defendant and the contributory negligence of the deceased were questions for the jury.

Same—Evidence—Life-Tables.—While life-tables are admissible to assist the jury in estimating the expectation of life, they are not essential. The jury may make their estimate from the evidence as to the age and health of the person.

Practice—Charge to be taken as Entirety.—It is not error that a particular instruction to the jury is incomplete, or does not present the whole law of the case, provided the whole charge, taken in its entirety, fully and fairly presents the law in a manner not calculated to mislead.

Appeal by defendant from an order of the district court for Jackson county, *Perkins, J.*, presiding, refusing a new trial after verdict of \$3,500 for plaintiff.

J. H. Howe, S. L. Perrin, and Daniel Rohrer, for appellant.

T. J. Knox and L. F. Lammers, for respondent.

MITCHELL, J. This was an action under the statute, to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant. The principal question is whether the verdict was justified by the evidence. As our conclusion, after an examination of the entire record, is that we would not be justified in reversing the order of the district judge refusing a new trial, we shall not attempt to state or discuss the evidence at any length, but content ourselves with referring to a few of the salient features of the case. On the day the deceased was killed he was engaged in unloading coal into a coal-house out of a flat-car which had been run by defendant on one of its side tracks opposite a coal-house, for the express purpose of enabling the owner of the coal to unload it. Defendant's station agent knew that the deceased was engaged in that work. There were on the same side track, and east of the coal-car, several box-cars, notably one large one attached to the flat-car, which

would prevent a person on the coal-car from seeing cars approaching from that direction. In this condition of things, an engine from a freight train was run in from the main track upon this side track, and from the east, for the purpose of getting out some empty box-cars. It struck and set in motion the cars east of the coal-car, which in turn struck and set in motion the coal-car, the wheels of which ran over and killed the deceased. From the position of the body, it is evident that, at the precise moment when the wheels ran over him, the deceased was lying on his back across and at right angles with the rail next the coal-house, his head lying between the rails, and his feet outside and towards the coal-house, his back immediately above the hips resting on the rail, which was some four inches above the ties on either side. That his arms were down by his sides, and his hands also on the rail, is evident from the fact that they were cut off or mangled by the car-wheels. There was evidence tending to show, and which would have justified the jury in finding, that the cars which set the coal-car in motion were driven down against it with very considerable violence, and without any signal or warning to the deceased. In view of all these facts, it can hardly be doubted that the jury were justified in finding that this was negligence on the part of the agents and servants of the railway company. That this negligence was the proximate cause of the death of the deceased cannot be doubted. Plaintiff's contention is that the evidence tends to show that the deceased, while in the line of his work, was thrown by the violent concussion from the coal-car against the coal-house, and then fell or was thrown backward across the rail, and under the moving car. If this was so, unquestionably the verdict is right. But, on the other hand, the defendant claims that the evidence shows that the deceased must have gotten off the car, and lain down under it, on the track, and probably gone to sleep. If the evidence proves this, unquestionably the deceased was himself guilty of negligence, and no recovery could be had, as the court expressly instructed the jury. And this is really the pivotal point in the case.

As no one saw the accident, the proof of the exact manner of its occurrence, or just what the deceased was doing at that precise time, consists entirely of circumstantial evidence. The circumstances bear-

ing more or less on the question are too numerous to be repeated. Defendant relies, as corroborating his theory, mainly upon the position and attitude of the body, together with the fact that an old boot which deceased wore on one foot was off, and lying near. On the other hand, plaintiff urges the improbability that any sane person would lie down and go to sleep under cars on a railroad track, and especially in so uncomfortable a position as having his back resting on an iron rail standing several inches higher than the ties. He also urges the fact that the evidence showed that both collar-bones had been broken by a force not applied to the breast-bone direct, but to the hands, or hands and points of the shoulders, and hence that they must have been broken before the deceased fell under the car. This he contends supports the theory that they were broken by his being thrown violently from the car against the coal-house. One witness, who was well acquainted with the deceased, and who was at work loading a car at a warehouse about 150 feet further west on the same side track, swears positively to having seen the deceased standing on the coal-car only a few minutes before the time he was killed. The weight of this witness' testimony is much weakened by the fact that he swears that the intervening track between him and the deceased was entirely clear, while it otherwise appears that there were in fact three box-cars on it, and that, accepting as true his statement as to his position when he saw deceased, these cars would have in all probability entirely intercepted his view of the coal-car. Still it is possible that he might be correct in the statement that he saw deceased, and mistaken as to his own position at the time, or as to the fact of the track being clear of cars.

While this is by no means a full statement, yet it is a sufficient outline to give a general idea of the state of the case upon the evidence. And while it is by no means free from doubt, and there are several circumstances which it is difficult to explain on either theory of the case, yet, inasmuch as there was ample evidence that the defendant was guilty of negligence which proximately caused the death of the deceased, and as the burden was upon it to affirmatively prove contributory negligence, our conclusion is that, upon the whole evidence, the case was one for the jury.

There are 12 assignments of error relating to the charge of the court, or its refusals to charge the jury, which may all be disposed of by a few general suggestions, without considering them *seriatim*. The defendant complains that in some portions of its charge the court, in effect, instructed the jury that they should find for the plaintiff in case they found that the death of the deceased was caused by the negligence of the defendant; thus leaving out of consideration the question of the contributory negligence of the deceased himself. We do not think the charge is fairly subject to any such criticism. No court can embody in one sentence or proposition all the rules of law applicable to a case. The charge must be taken as a whole, and not in fragments. Thus considered, we think the charge was a full, fair, and unusually clear statement of the law applicable to such cases. The court expressly charged the jury that, "if the deceased was made aware of the approach of the cars in any manner whatever, then it was his duty to act on it in reference to his safety, and it would be negligence on his part to work regardless of the danger, in a dangerous or exposed position, where he would be liable to be thrown from the car when struck;" also that, "if you find from the evidence that before and at the time of the casualty the deceased was on the railroad track, not engaged in unloading the car, then the defendant did not owe him any duty, and his death was not caused by the acts of the defendant solely, and the plaintiff cannot recover;" and again, "if you believe from the evidence that before the coal-car was moved at the time of the casualty the deceased had gone underneath the coal-car, and that while there he was run over and killed, then his death was caused by his own negligence, and there can be no recovery in this action." These instructions, being in the concrete form, and exactly fitted to the case, were easy to be understood by the jury, and fully covered every supposable act of contributory negligence which there was any evidence tending to prove.

The criticisms upon the charge as to the measure of damages, and what facts and circumstances the jury were to take into account in fixing the amount, in case they found for the plaintiff, are, in our judgment, wholly unwarranted. For example, it is assigned as error that the court charged that they might take into account the prob-

abilities of the duration of deceased's life, and refused to instruct them that there was no evidence as to the expectation of his life. The point of this is that neither the Carlisle tables, nor any similar tables, were introduced in evidence. The age of deceased, however, was proved. The Carlisle and other life-tables are admissible in evidence to assist the jury in estimating the expectation of life, but are not essential. They may make their estimate from the age, health, habits, and physical condition of the person at the time of his death. *Scheffler v. Minn. & St. Louis Ry. Co.*, 32 Minn. 518, (21 N. W. Rep. 711;) 3 Suth. Dam. 283; *Beems v. Chicago, etc., Ry. Co.*, 67 Iowa, 435, (25 N. W. Rep. 693.) Neither do we find any error in the rulings of the court in the admission of evidence on the trial.

Order affirmed.

CALEB D. DORR *vs.* PHINEAS McDONALD.

June 11, 1890.

Unlawful Detainer — Sufficiency of Complaint. — The complaint *held* good as against an objection raised for the first time in this court, on appeal from the judgment.

Appeal by defendant from a judgment of the municipal court of Minneapolis.

W. H. Donahue and *Orville Rinehart*, for appellant.

Laybourn & McHugh, for respondent.

MITCHELL, J. In an action for unlawful detainer, plaintiff's counsel drew a very poor complaint. But the defendant, without objection to it, joined issue and went to trial on the merits, and, being defeated, on appeal from the judgment, now, for the first time, raises an objection to the sufficiency of the complaint. In the absence of a case or bill of exceptions, we will presume that defendant voluntarily consented to the trial of all the issues involved in the verdict that plaintiff was entitled to the possession of the premises. As against an objection interposed at this stage of the proceedings, the

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complaint should be held sufficient. Within the rule of *Smith v. Dennett*, 15 Minn. 59, (81,) we think that it is fairly inferable by reasonable intendment from what is alleged that, while the original letting was for only a month, the defendant continued in the occupancy of the premises as tenant from month to month. Indeed, if it was necessary, in order to sustain the judgment, we would be justified, under the circumstances, in directing the court below to permit the complaint to be amended so as to conform to the facts proved.

Judgment affirmed.

S. W. FARMER vs. OLIVER CROSBY and another.

June 11, 1890.

Levy under Void Judgment—Liability of Attorney and of Party.—

An attorney is liable to third persons for damages for causing process to be issued at the instance of his client, only when he acts dishonestly, with some sinister view or improper purpose of his own which in law amounts to malice. But the party to the action who causes process to be issued upon a void judgment is, even in the absence of malice, liable for the act of the officer in levying on property in obedience to the writ.

Same—Failure to Prove Malice—Recovery for Trespass.—

The rule that a party is entitled to any relief "consistent with the case made by the complaint, and embraced within the issue," held to apply to a case where the allegations were that the defendant maliciously and fraudulently procured an officer to make a false return of service of a summons, and upon such false return entered judgment by default against the defendant therein, caused execution to be issued, and his personal property to be levied on, while the proof, failing to establish malice or fraud, showed that the officer's return was in fact false, and that the plaintiff in the action caused judgment to be entered and execution to be issued; that the judgment was subsequently set aside; and that, after the judgment was thus vacated, the officer, in obedience to the execution, levied on the property of the defendant in the writ.

Practice—Case for Nominal Damages—Dismissal.—When a party has established a cause of action for nominal damages, it is error to dismiss the case, where the recovery of nominal damages would carry costs.

Appeal by plaintiff from an order of the district court for Ramsey county refusing a new trial after a trial before *Kerr, J.*, and a dismissal ordered.

A. C. Hickman, for appellant.

S. P. Crosby, for respondents.

MITCHELL, J. This action grew out of that of *Crosby v. Farmer*, 39 Minn. 305, (40 N. W. Rep. 71,) in which the plaintiff here was the defendant, and Oliver Crosby the plaintiff, and S. P. Crosby his attorney, and the judgment in which was set aside as void because there was no service of the summons upon the defendant. The allegations of the complaint are that in this former action the present defendants fraudulently and maliciously procured an officer to make a false return of personal service of the summons, and that, knowing such return to be false, they caused judgment on default to be entered against the present plaintiff, execution to be issued, and his personal property to be levied on and taken thereon. When the plaintiff rested, the court dismissed the action as to both defendants. An examination of the evidence satisfies us that the plaintiff entirely failed to prove any malice, fraud, or bad faith against either of the defendants. Indeed, his counsel here admits this to be the fact as to all proceedings up to and including the entry of judgment. The only charge of malice or bad faith which he now makes against the defendants is the issuing of execution after notice of the fact that the return of service of the summons was false, and causing plaintiff's property to be levied on after the judgment had been set aside. It appears that the execution was taken out and transmitted to the sheriff of Steele county, with instructions to collect, two days after the defendant (plaintiff here) had served notice of motion to have the judgment set aside. But the plaintiff and his attorney (defendants here) were not bound to accept as true the *ex parte* affidavits on which this motion was made. The sufficiency of the service of the summons depended upon the question whether the legal residence of Farmer was in Owatonna, where his family was living, or in St. Paul, where he boarded and spent most of his time, and where he was carrying on business. The judgment still remained apparently in full force and regular on its face, with the return of an officer

showing good service of summons. In the absence of malice or bad faith, S. P. Crosby would not be liable for causing an execution to be issued on the judgment at the instance of his client. An attorney is only liable where he institutes proceedings without authority from his client, or where he and his client fraudulently conspire to do an illegal act, or where he acts dishonestly, with some sinister view, or for some improper purpose of his own which the law considers malicious. *Bicknell v. Dorion*, 16 Pick. 478; *Anon.*, 1 Mod. 209; *Davies v. Jenkins*, 11 Mees. & W. 745; Whart. Ag. § 611. It is true that the sheriff of Steele county made the levy a short time after the judgment was in fact vacated; but there was no evidence that this was at any directions of either of the defendants given afterwards. On the contrary, it is quite apparent that the only instructions to the sheriff were transmitted to him, with the execution itself, some time before the judgment was set aside. It does not appear when defendants received notice of the vacation of the judgment; but, assuming it was on the day the order was made, all that could be charged against them in that regard is that they were negligent in not more promptly recalling the execution. The action was therefore properly dismissed as to S. P. Crosby.

His codefendant, Oliver Crosby, however, who was plaintiff in the other action, occupies a different relation to the matter. Where a creditor causes an execution to issue upon a void judgment, he is liable for the damages arising from the acts of the officer in obedience to the writ. *Gunz v. Heffner*, 33 Minn. 215, (32 N. W. Rep. 386.) In this instance, although the judgment was not vacated until March 20th, yet it was jurisdictionally void *ab initio*; and, moreover, the levy was not in fact made until April 3d. While the fact that the writ was regular on its face would protect the officer, and while the attorney who issued it at the direction of his client, in good faith, would not be liable, and while, if a judgment is merely erroneous, and hence valid until reversed, it might protect even the judgment creditor for acts done under it before reversal, (see *Peck v. McLean*, 36 Minn. 228, 30 N. W. Rep. 759,) and even conceding that the judgment in this case would have protected Oliver Crosby for any thing done under it until it was formally vacated, yet, having set the

process of the court in motion, and having placed it in the hands of an officer with directions to execute it, he is liable for the act of the officer, in obedience to it, in making the levy after the judgment upon which it was issued was vacated. He was bound at his peril to see that the execution was recalled, or proceedings under it stayed. Therefore, while the plaintiff failed to establish his allegations of fraud or malice, yet he made out a cause of action for trespass against the defendant Oliver Crosby. While the grounds of this cause of action are somewhat different from those contemplated by the pleader in drawing the complaint, yet it is "consistent with the case made by the complaint, and embraced within the issue;" the actionable wrong being still the tortious taking of plaintiff's property. To allow a party to recover upon a theory of the case different from that on which his complaint was drawn (suggested often for the first time in this court) may be misleading to trial courts and opposing counsel, and be practically offering a premium for careless pleading; yet the doctrine of the Code, liberally construed by our own decisions, is that a party may have any relief to which, upon the allegations and proof, he is entitled. Gen. St. 1878, c. 66, § 267; *Thompson v. Bickford*, 19 Minn. 1, (17;) *Washburn v. Mendenhall*, 21 Minn. 332; *Minneapolis Harvester Works v. Smith*, 30 Minn. 399, 405, (16 N. W. Rep. 462;) *Hatch v. Coddington*, 32 Minn. 92, (19 N. W. Rep. 393;) *Mykleby v. Chicago, St. Paul, M. & O. Ry. Co.*, 39 Minn. 54, (38 N. W. Rep. 763;) *Alworth v. Seymour*, 42 Minn. 526, (44 N. W. Rep. 1080.)

Upon the evidence, the plaintiff only made a case for nominal damages; but, as this would have carried costs, it was error to dismiss. *Potter v. Mellen*, 36 Minn. 122, (30 N. W. Rep. 438.) In *Harris v. Kerr*, 37 Minn. 537, (35 N. W. Rep. 379,) if defendant had been allowed nominal damages by way of offset or counterclaim, it would not have affected the question of costs.

Order affirmed as to S. P. Crosby, and reversed as to Oliver Crosby.

NOTE. A motion for a reargument of this case was denied June 19, 1890.

GEORGE A. CLARK and another vs. ALBERT H. LINDEKE, Assignee.

June 13, 1890.

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Insolvency—Partnership—What Debts are Provable.—The members of a copartnership having made a general assignment of both individual and partnership property for the benefit of creditors, a debt of the insolvents is provable as a claim in the insolvency proceedings, whether the debt be of an individual or partnership character.

Same—Debts of Old Firm Assumed by Insolvent Firm.—It being agreed between the members of a copartnership that it should be dissolved; that a new partnership should be formed, consisting of some of the members of the old firm; that the new firm should take all the assets of the old firm, and should pay all its debts,—*held*, that an indebtedness thus assumed became a debt of the new firm, and provable as such in subsequent insolvency proceedings against the new firm.

Same—Note for Amount of Former Note and Interest.—An allowance by the district court, as a claim against an insolvent estate, of the amount of a promissory note of the insolvents given in renewal of former notes for an indebtedness, sustained, although the new note included a certain amount of interest computed on the former notes, while the latter did not on their face bear interest before maturity; the evidence not having been returned.

Appeal by defendant from a judgment of the district court for Hennepin county, allowing plaintiffs' claim of \$146,333 against the insolvent estate of his assignors.

Wilson & Lawrence, Lusk & Bunn, and J. M. Shaw, for appellant.
Charles B. Meyer and Jackson & Atwater, for respondents.

DICKINSON, J. The partnership firm of Geo. A. Clark & Bro. presented a claim of indebtedness of \$146,333 for allowance against the insolvent estate of the firm of Shotwell, Clerihew & Lothman, which was disallowed by the assignee. The claimants appealed to the district court. The matter was referred to George C. Ripley, Esq., upon whose report, in favor of the claimants, judgment was entered allowing the claim. From that judgment the assignee of the insolvent estate prosecutes this appeal.

From the findings of fact by the referee we draw this brief statement of the case, omitting some facts which we deem immaterial: For some years prior to February, 1884, the assignors, Shotwell, Clerihew & Lothman, were engaged in business at Cincinnati, Ohio, as partners. William Clark, a member of the partnership firm of Geo. A. Clark & Bro., these claimants, was a limited partner in that firm. During the continuance of that copartnership, and prior to 1884, the claimants, Geo. A. Clark & Bro., loaned large sums of money, for which the notes of the firm were given. Such indebtedness amounted to \$145,000 on January 1, 1884. Prior to February 2, 1884, it was agreed by the members of that firm that it should be dissolved at that time, and the three general partners, Shotwell, Clerihew, and Lothman, agreed to form a new partnership to do business at Minneapolis, in this state. They were to enter upon the new business February 4, 1884. These agreements were carried into effect. It was further agreed between the claimants and the members about to form the Minneapolis partnership, that the latter should take the assets and pay the liabilities of the Cincinnati firm, including the indebtedness of \$145,000 to Geo. A. Clark & Bro. Pursuant to this agreement, new notes were executed by Shotwell, Clerihew & Lothman to Geo. A. Clark & Bro., amounting to \$145,000, and they were taken by the latter firm in place of the notes previously given them by the old firm. These notes bore no interest on their face; but about a month subsequent to the giving of those notes a further agreement was entered into, under seal, whereby it was contracted, among other things, that, if any of the notes should not be paid at maturity, then they should all immediately become due and payable. It was also provided therein that the indebtedness represented by the notes should "draw interest at and after the rate of six per cent. per annum." There is no specific finding by the referee as to when the notes became payable, and the evidence is not before us. The assets of the Cincinnati firm thus transferred to the new or Minneapolis firm consisted of over \$145,000 in merchandise, about \$7,000 cash, besides bills and accounts receivable. The Minneapolis firm proceeded to pay all the debts of the old partnership except that due to these claimants. Upon the

said \$145,000 of notes held by the latter, the Minneapolis firm—Shotwell, Clerihew & Lothman—paid \$21,000 prior to February 4, 1887. At about the latter date a computation was made and agreed upon between the debtors and these claimants of the amount of interest unpaid on the said notes; and in March, 1887, a new note was executed in favor of these claimants by the debtor firm for \$146,333, and this was taken in place of the notes previously given. This note included \$22,333 interest on the former notes, as determined by the computation and agreement of the parties. This note of \$146,333 evidences the claim here in question. Shotwell, Clerihew & Lothman continued their partnership business until June 20, 1888, when they made the assignment for the benefit of creditors.

One ground upon which the assignee disputes the propriety of the allowance of this claim is because, as is said, the claim was the debt of another partnership which this firm assumed, and the creditors of this insolvent firm are equitably entitled to be first paid out of the insolvent estate. This may be sufficiently answered in two ways. This assignment is of both partnership and individual property, for the payment of all the debts of the assignors, whether they be debts of the partnership or of the individual members. The original indebtedness to these claimants, and which is now represented by the note for \$146,333, was a debt for which these assignors were responsible. Their liability has never ceased, and, in any possible view of the case, the claim is provable as a debt of the insolvent assignors. But again, when the Minneapolis firm purchased the assets of the Cincinnati firm, on the dissolution of the latter, and agreed to pay its debts, including that owing these claimants, that became a debt of the new partnership. That indebtedness has never been paid, and the note in question represents the same debt. It is a debt of the insolvent partnership.

But, further, it is contended that the allowance was erroneous to the extent of the \$22,333 of interest included in the note last given. No error is apparent in this. This interest may have accrued subsequently to the maturity and default in payment of one of the notes, upon which event, by the terms of the agreement above referred to, all the notes were to become immediately payable, and upon which

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interest would be chargeable as from maturity. Or it may be that the agreement of the parties at the time of making the written contract, shortly after the notes were given, included an agreement that the notes should draw interest from their date, and that the obviously incomplete statement in the writing, recited in the foregoing statement of the case, was intended to express such an agreement. If by mistake in the omission, after the word "after," of whatever was necessary and was intended to have been written to make the sentence complete, the writing failed to express the agreement of the parties, it would not follow that the agreement actually made should not be effectual. A suit for reformation might have been maintained; and, even without a judicial reformation of the contract, the parties might with propriety carry into effect any contract which they may have made for the allowance of interest.

Judgment affirmed.

R. A. HARBORD and another vs. EDWARD COOPER.

June 13. 1890.

Guaranty of Note—Assignment.—The payee of negotiable paper having by indorsement made it payable to the order of another, adding also in the same indorsed contract a guaranty of payment, *held*, that the contract thus indorsed was assignable, and the assignee might recover thereon; and, further, that the assignment of the notes transferred also the indorsed contract of guaranty.

Appeal by defendant from an order of the district court for Nobles county, *Perkins, J.*, presiding, overruling his demurrer to the complaint.

Daniel Rohrer, for appellant.

P. E. Brown, for respondents.

DICKINSON, J. Appeal from an order overruling a demurrer to the complaint. The defendant, being the payee of several negotiable promissory notes, sold and transferred them before maturity, indors-

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ing them as follows: "Pay to the order of M. B. S. Dodsworth, Pt. For value received, I hereby guaranty the payment of the within note at maturity, or at any time thereafter, with interest at the rate of ten per cent. per annum until paid, waiving demand, notice of non-payment, and protest. EDWARD COOPER." It appears from the complaint that Dodsworth was a member, and the nominal president, of a banking copartnership; that the abbreviation "Pt." was intended to designate that person in his character of president of the bank; and that the notes thus indorsed were delivered to the bank, the transaction being with the partnership. Afterwards Dodsworth and his copartners sold and disposed of all their partnership property to the plaintiffs, and delivered the same to them, including these notes. The notes have not been fully paid, and a recovery is sought against the defendant on his contracts indorsed on the notes.

The indorsement made by the defendant upon each of the notes constituted both an indorsement of the same, by which they were made payable to the order of Dodsworth, representing the copartnership, and a guaranty of payment. It is contended on the part of the defendant that the contract of guaranty was not negotiable, was not transferred to the plaintiffs, and that they have no right of action on it. It is unnecessary to consider whether the qualities of negotiability attached to that part of the contract, for the notes with the indorsements do not appear to have been transferred to the plaintiffs in such a manner as to have entitled them to the peculiar privileges of the holders of negotiable paper. The complaint does show that *all the property* of the partnership, including the notes, had passed by assignment to the plaintiffs. That would include the choses in action, the contracts of guaranty made by the defendant, if such contracts were assignable; for they were part of the property of that partnership. Whatever might be the effect of a contract obligation assumed towards a particular person, and in terms restricted to him personally, this contract was not thus restricted; and it was assignable as rights of property in general, and such rights of action as survive to the personal representatives upon the death of the owner, are now recognized to be. The obligation assumed by the defendant was not, in legal effect, restricted to Dodsworth. It was

not only general in its form, but it was an unrestricted guaranty of the payment of an instrument in terms negotiable, and which the defendant's indorsement made payable to Dodsworth *or order*. The assignment of the notes would carry with it the indorsed guaranty of payment. *Stillman v. Northrup*, 109 N. Y. 473, (17 N. W. Rep. 379;) *Clafin v. Ostrom*, 54 N. Y. 581; *Craig v. Parkis*, 40 N. Y. 181; *McLaren v. Watson*, 26 Wend. 425; *Ketchell v. Burns*, 24 Wend. 456; *Waldron v. Harring*, 28 Mich. 493; *Reed v. Garvin*, 19 Serg. & R. 100.

Order affirmed.

HENRY A. BRUNS vs. SALLIE SCHREIBER and another, Administrators.

June 13, 1890.

Covenant against Incumbrances — Evidence of Oral Agreement.—

In an action to recover for breach of covenant against incumbrances in a deed conveying lands for one entire pecuniary consideration expressed in the deed, and actually paid, evidence is not admissible, in defence, of a prior parol agreement to the effect that as to a part of the granted land, upon which an incumbrance rested, that consideration was not applicable, but that the conveyance was gratuitous.

Action brought in the district court for Clay county, to recover \$11,000 damages for breach of a covenant against incumbrances. Trial before *Mills, J.*, and verdict for defendants. Appeal by plaintiff from an order refusing a new trial.

R. R. Briggs, for appellant.

Burnham & Tillotson, for respondents.

DICKINSON, J. This is an appeal by the plaintiff from an order denying a new trial after verdict in favor of the defendants. The action was prosecuted against Franklin J. Schreiber (who has died, and in whose place his administrators have been substituted as defendants) and his wife, Sallie, to recover damages for a breach of the covenants in a deed of conveyance executed by Schreiber and wife to the plaintiff, in 1881, conveying a large tract of land. The consid-

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eration expressed in the deed was the payment by the grantee of the sum of \$45,000. The deed contained the usual covenants, on the part of the grantors, of seisin, warranty of title, and quiet enjoyment, and of freedom from incumbrances; the terms of the latter covenant being qualified only by an express exception as to certain mortgages, which the grantee was to assume. The alleged breach upon which recovery is sought is that the granted land was burdened with an easement in favor of the Northern Pacific Railroad Company, which corporation had a right of way over the land, and had constructed and was operating its railroad there. Upon the case presented at the trial the court ruled, and instructed the jury, that the land was subject to that servitude, and that this constituted an incumbrance. The contention on this appeal arises from the fact that parol evidence was received bearing upon the effect to be ascribed to the covenants in the deed as respects that incumbrance. It was in substance alleged, in defence of this action, that, prior to the execution and delivery of this deed, it was agreed orally between the parties thereto that the plaintiff—the grantee in the deed to be executed—should himself convey to the Northern Pacific Railroad Company, without consideration, the right of way now said to belong to that company, in compliance with a parol agreement which Schreiber had previously made with the corporation, and that this land was included in the deed to the plaintiff in order that he might make such conveyance; that there was really no other consideration for the conveyance of that land to the plaintiff by the deed in question, no part of the expressed consideration of \$45,000 being applicable to that part of the granted premises. The court received parol evidence of this agreement alleged to have been made previous to the execution of the deed. The admissibility of such evidence is the real point of controversy on this appeal. The jury returned a verdict for the defendants.

The respondents, recognizing the general rule which forbids the contradiction or variation of the written agreements of parties by proof of their prior or contemporaneous negotiations or agreements resting only in parol, claim that this case is within a recognized qualification of that rule. They seek to avail themselves of the general proposition that the statement of the *consideration* in a deed of

conveyance is not conclusive upon the parties, and hence insist that they might show that this parol agreement of the plaintiff formed a consideration for the deed in addition to the consideration expressed therein; and that, this being shown, the grantee ought not to recover damages for the incumbrance which he, acting perhaps upon the assumption that it did not then exist, thus agreed to create by a conveyance of the easement to the railroad company. The reception of this evidence cannot be sustained on this theory. No mistake or fraud is alleged. The deed was complete, operative, and of legal effect, and is to be taken to have been just as the parties intended it to be. It is not claimed that it was invalid, or that it was not immediately operative when it was delivered, nor that the consideration named in it was not paid. There is no uncertainty or room for contention as to the legal effect of the deed, and of the covenants embraced therein, standing alone, and unmodified by extraneous proof of some other agreement. It embraced a grant of the land over which the railroad easement existed, with other lands, the expressed consideration for all of which was the entire sum of \$45,000, which was in fact paid. The covenants were in terms applicable to all the granted lands; and, if any part of the same was burdened with the servitude of a railroad right of way, that would constitute a breach of one or more of the covenants,—certainly that against incumbrances. The defendants thus became liable to respond in damages for breach of covenant. Such was the legal effect of the instrument by which the parties carried into effect their prior negotiations, and expressed their final agreement and obligations respecting the land thus conveyed. The evidence received and acted upon in this case cannot but be regarded as varying the definite, certain, legal effect of the deed. It went to show that the covenants were applicable only to a part of the lands conveyed; the remainder being, by force merely of the prior oral agreement, in effect excluded from the operation of the express covenants. If it were sought to do this by direct proof of a parol agreement that the covenants in the deed should not be deemed applicable to a specified part of the granted lands, no argument consistent with the existence of the general rule relating to the subject could be advanced in support of such an attempt. Nor could it make

any difference that such oral agreement, made prior to or contemporaneous with the execution of the deed, and not relating to some collateral matter, may have been a consideration for the execution of the deed. To admit such evidence upon that ground would be to disregard the reason upon which the rule is founded, and would leave room for but a very limited application of the rule giving the character of conclusiveness to written instruments deliberately adopted by the parties as embodying their final agreements; for it might generally be said in support of the right to present such evidence that the written agreement was made in consideration of the prior or contemporaneous oral agreements sought to be introduced.

But it is urged that the evidence was admissible as bearing upon the measure of damages, the recovery for breach of covenant being restricted in amount to the real consideration for which the deed was given. It is probably true that for this purpose it might have been shown that the consideration named in the deed had not been paid, or that the real consideration was less than that stated. But, it being conceded that the stated consideration was paid, a separate agreement cannot be shown, having the effect to restrict the legal operation of the covenants, even though such agreement might be shown to have constituted a consideration or inducement for the giving of the deed. As was said in a late case in Massachusetts: "While, for some purposes, it is competent to show what the real consideration of a deed is, a party cannot, under the guise of showing what the consideration is, prove an oral agreement, either antecedent to or contemporaneous with the deed, which will cut down or vary the stipulations of his written covenant." *Simanovich v. Wood*, 145 Mass. 180, (13 N. E. Rep. 391.) This case was closely analogous to that before us. To the same effect: *Flynn v. Bourneuf*, 143 Mass. 277, (9 N. E. Rep. 650;); *Howe v. Walker*, 4 Gray, 318; *Spurr v. Andrew*, 6 Allen, 420; *Johnson v. Walter*, 60 Iowa, 315, (14 N. W. Rep. 325;); *MacLeod v. Skiles*, 81 Mo. 595; *Wadhams v. Swan*, 109 Ill. 46, 60; *Rawle, Cov.* (5th Ed.) § 88. The evidence here in question was inadmissible because it did vary and restrict the legal effect of the deed, not as to the price paid as stated in the deed, for there is no dispute as to that, but in the scope and applicability of

the covenants, and the liability of the covenantor for their breach. It went to show that while the deed conveyed the land as an entirety, for which deed the stated consideration was paid, and in respect to all which conveyed premises the covenants were in terms made, yet in fact, as to a part of the land, designated only by this parol evidence, it was conveyed gratuitously, none of the price paid being applicable to that, and hence that the covenantor was not legally liable to respond in substantial damages for any defect of title, or for any incumbrance in respect thereto. We cannot understand how evidence of a parol agreement thus affecting the deed, and the legal obligations of the grantor imported by the deed, can be received without disregarding the plain reasons upon which the rule rests, and which are applicable in their full force to such a case. We are aware that there are decisions which support the admissibility of such evidence. *Lelund v. Stone*, 10 Mass. 459, which has been followed elsewhere, may serve as an illustration. That decision seems, however, to have been disapproved in *Spurr v. Andrew*, *supra*, and is certainly opposed to the later decisions of the same court, some of which we have cited.

The conclusion which we have expressed is not opposed to the decision in *Jordan v. White*, 20 Minn. 77, (91,) in which case the evidence of the parol agreement related to other lands than those conveyed by deed to the defendant. It did not vary or change the legal effect of, and was not inconsistent with, the deed of the 120 acres executed to the defendant subsequent to the negotiations in the course of which the oral agreement was made. That deed was not presumed to embody or to have merged agreements which may have been previously made relating to other lands, not the subject of that conveyance nor referred to therein.

Order reversed.

FREDERICK PETERS and Wife vs. HENRY TUNELL and others.

June 18, 1890.

Vendor's Lien — Gross Sale of Real and Personal Property. — A vendor's lien upon real estate does not arise in the case of a sale of both real and personal property, for one entire sum or consideration, without any distinct price being set upon the real property.

Same—Sale of Realty—Consideration of Uncertain Value.—Nor is such a lien implied to secure the performance of the consideration for the transfer of real estate when the consideration is of such a nature that the court cannot accurately ascertain and define the amount of the charge to be thus imposed upon the land, as where the consideration is an agreement to support the grantor during life.

Appeal by plaintiffs from an order of the district court for Freeborn county, *Farmer, J.*, presiding, sustaining the demurrer of the defendants Hintz, Peters, and Steep.

John Whytock, for appellants.

Eustis & Morgan, for respondents.

DICKINSON, J. This is an appeal by the plaintiffs from an order sustaining a demurrer to the complaint. The facts set forth in the complaint may be briefly stated to be as follows: In 1877 the plaintiffs, who are husband and wife, owned the land which is the subject of this action, consisting of 160 acres, it being their farm. In that year they entered into an agreement with their son, the defendant Frederick Peters, Jr., for the sale and transfer to him of the farm, and certain valuable personal property, in consideration of a written agreement on his part which is fully set forth in the complaint. The general nature of this agreement of the son was in part for the support of the plaintiffs during their lives, the specific agreement being that he should pay to them yearly a stated sum of money; provide them with stated quantities of farm produce, the use of a cow, and of two sheep, as long as sheep should be kept on the farm; one-fourth of all the eggs produced on the farm; to provide a room for their occupancy; and to make certain provision for and payments to other persons named, in certain specified contingencies. In consideration

of this agreement the plaintiffs conveyed the land to their son by warranty deed expressing the consideration of \$1,500. The written agreement of the grantee, although contemporaneous with the deed, was not referred to therein. In 1879 the said grantee, Frederick, Jr., with the consent of the plaintiffs and for their benefit, conveyed the farm to the defendant Reiners, the consideration being an agreement by Reiners to assume and perform the said obligations of Frederick, Jr., to the plaintiffs. In 1881, Reiners, with the consent of the plaintiffs, sold and conveyed the farm to the defendant Tunell, the consideration being an agreement by the latter to assume and perform the same obligations; and he received the said personal property, and went into possession of the farm. In 1883, Tunell, without the knowledge or consent of the plaintiffs, and with intent to defraud them, sold and conveyed 80 acres of the land to the defendant August Hintz, 40 acres to the defendant Henry Peters, and the remaining 40 acres to the defendant George Steep. The title thus conveyed still remains in the three grantees last named. The plaintiffs were compelled to leave the farm in 1882 because they were not provided with the means of maintenance. The defendants Frederick Peters, Jr., Reiners, and Tunell have failed to perform the obligations assumed by them, successively, \$1,000 of the money agreed to be paid being now unpaid, and they are now insolvent. All of the successive grantees of the land had knowledge of the terms and conditions of these agreements made for the support of the plaintiffs.

The plaintiffs seek such relief as might be had upon a vendor's lien. It is indeed apparent that they have no remedy, as respects the land, unless it is to be considered that they enjoyed the equitable right of a vendor's lien to secure the performance of the agreement made for their support. The conveyance by deed from the plaintiffs having been absolute, without condition, and without fraud, the subsequent breach of the personal obligation of the grantee, which was the consideration for the conveyance, did not affect the title which had been thus effectually transferred. As to the validity and legal effect of the deed to the plaintiffs' son, no question can arise. It is not alleged to have been procured by any solicitation or undue influ-

ence, or that the transaction was affected by fraud, or that the grantors suffered under any mental infirmity. It appears from the complaint that the agreement for the plaintiffs' support in the manner set forth was made in consideration of the sale and transfer both of the land and of "certain valuable personal property," and, so far as appears, without any price or consideration being fixed upon the two classes of property separately; the sale and transfer of the whole property being the entire and unapportioned consideration for the agreement for support. But as a vendor's lien does not arise, according to the common law, from a sale and delivery of personal property, but is confined to sales of real estate, it follows that the plaintiffs did not acquire a lien to secure the performance of this contract, which, according to the complaint, was the consideration or price for the sale of both the personal property and the land, without distinction. *Stringfellow v. Ivie*, 73 Ala. 209; *Wilkinson v. Parmer*, 82 Ala. 367, (3 South. Rep. 4;) *McCandlish v. Keen*, 13 Grat. 615; 2 Jones, Liens, § 1072.

But upon broader grounds we arrive at the same conclusion. It is in accordance with what is deemed to be the greater weight of authority that a vendor of real property is not entitled to an implied equitable lien to secure the performance of the consideration when that is of such a nature, as is that in this case, that the court cannot accurately ascertain and define the amount of the charge to be imposed upon the land and enforced out of it. *Arlin v. Brown*, 44 N. H. 102; *Brawley v. Catron*, 8 Leigh, 522; *Hiscock v. Norton*, 42 Mich. 320, (3 N. W. Rep. 868;) *Clarke v. Royle*, 3 Sim. 499; 1 Perry, Trusts, (4th Ed.) § 235; 2 Jones, Liens, § 1071. In *Hammond v. Peyton*, 34 Minn. 529, (27 N. W. Rep. 72,) it was shown that the tendency both of adjudication and of legislation was opposed to an extension of the doctrine of vendor's lien beyond what might be regarded as the established rules of equity upon the subject; and reasons were there suggested why this policy of restriction, rather than of extension, should be pursued. Those reasons, and the principle of that decision, are applicable to affect the decision of this case. While there are some decisions which support the right of lien in similar cases, it is considered that the stronger current of au-

thority is the other way, that the stronger reasons are opposed to it, and that to allow the implication of a reserved lien in this case would be extending the doctrine beyond its hitherto established limits. Indeed the practical difficulty of enforcing such a lien, in a case like this, is in itself a reason against the existence of the lien. The contract was not to be performed by a single act, and once for all; but performance was to extend indefinitely over a period, it might be, of many years, and was to consist of various acts besides the payment of money. What was required to be done was contingent and uncertain, depending upon future events impossible to be calculated or ascertained, and this uncertainty as to what was to be done would continue indefinitely. There was no lien, unless it existed from the beginning, at the time of the conveyance, and before any obligation had become defined, certain, and ascertainable. It certainly has not been generally supposed that the doctrine of vendor's lien extended to contracts of such a nature.

Order affirmed.

RETTA S. BRACH vs. SAMUEL D. GAYLORD.

June 18, 1890.

Surface Water—Discharge of Rain-Water by Pipes.—The owner of an upper estate, on which he has erected a house, has no right to collect the waters which fall upon his roof into gutters, and from thence, by means of a conducting pipe, transfer and discharge them, although upon his own land, at such a place and in such a manner that, necessarily and inevitably, they are precipitated upon lower premises in an unnatural, unusual, and injurious volume and quantity.

Findings of fact *held* sufficient to sustain the judgment.

Appeal by defendant from a judgment of the district court for Hennepin county, where the action was tried by *Rea, J.*, certain issues being submitted to a jury.

Kitchel, Cohen & Shaw, for appellant.

Russell, Calhoun & Reed, for respondent.

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COLLINS, J. From the findings of fact in this case, made after several questions had been submitted to and answered by a jury, it appears that plaintiff and defendant owned and occupied adjoining lots in the city of Minneapolis. The plaintiff's dwelling-house stood 35 inches, and the defendant's 27 inches, from the dividing line; and consequently the houses were only about 5 feet apart. On this line the plaintiff had built a high board fence. The defendant's lot was from one to two feet higher than that of plaintiff, sloped towards it, and was lower near the centre of his own house, and near the centre of plaintiff's as well, than at either end. The roof upon defendant's house was so constructed that a part of the waters falling thereon were gathered into gutters, and from thence, flowing into and through a conducting pipe, were discharged upon defendant's land in the open space between his house and the fence on the line, of about two feet in width. At and about the place where the waters were so discharged, the soil of plaintiff's lot was sandy and pervious to water. The court also found that the waters so gathered into the conducting pipe, and discharged on defendant's land in the space before mentioned, flowed through and under the fence on to plaintiff's lot "in such large quantities as are likely to be injurious," and drained under and through the foundation walls of her house, filling her cellar at times to the depth of three feet, rendering it useless, and the house damp and mouldy, to her damage in the sum previously fixed by the verdict of the jury, for which sum, and that defendant be restrained and prohibited from future acts of the same character, judgment was ordered in plaintiff's favor.

The appeal is from a judgment entered in accordance with the findings and order; the assignments of error being, in effect, that the findings of fact did not warrant the conclusion of law, because it was not found that the defendant cast water upon the plaintiff's premises in increased or injurious quantities. The appellant insists that the findings are incomplete and insufficient in this respect, citing a large number of cases from the reports of this state on the subject of surface waters, commencing with *Lee v. City of Minneapolis*, 22 Minn. 13, and ending with *Jordan v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 172, (43 N. W. Rep. 849.) Some of these cases have a bearing upon

the question now to be determined, but in several the act complained of, and which was declared unlawful, consisted in accumulating surface waters in pools or ditches, and then, without a grant, precipitating them in destructive torrents over the lands of others, where they *would not otherwise have gone*, to the damage of the latter lands. Such an act has been declared a positive invasion,—a trespass upon one's property rights. But, in the case at bar, it is obvious from the findings that, had no house been built by the defendant, the water which fell upon his lot would have naturally sought the plaintiff's land, and spread itself over its lower surface to some extent; and it is equally as obvious that if the water which descended upon the roof of his house had been permitted to drip from the eaves, had not been gathered into gutters and thence transferred to a single conducting pipe, it would have naturally diffused itself over plaintiff's lower estate, possibly to her injury, but for which she would have no remedy, under ordinary circumstances. And these facts should be considered in giving effect to the finding last mentioned, which is the one specially pointed out as defective. The finding is not as clear and comprehensive as it might have been written; but it is apparent from it that, by means of the gutters upon defendant's roof, he has gathered up the water which fell thereon, and through the conducting pipe has transferred it to the ground at a point in close proximity to plaintiff's dwelling, without any apparent necessity for so doing in the proper improvement and enjoyment of his own land, to the plaintiff's great injury. The natural and inevitable result of gathering the water by these artificial means was to largely increase the quantity at the point where it reached the ground, and consequently the quantity which was turned upon plaintiff's premises in the immediate vicinity of the discharging end of the pipe. The natural flow of the surface water from the higher to the lower estate was so changed and diverted that it did not shed or spread over plaintiff's premises, but, after being collected at one point, necessarily in a largely increased volume, was precipitated, in an unnatural and unusual quantity and manner, so near to plaintiff's house as to necessarily cause her an injury. The direct result of defendant's act was to cast the water upon plaintiff in one particular place in an increased and injurious volume and

quantity. This he had no right to do, for although, under the common-law rule as to surface waters which has been adopted in this state, it is held to be a common enemy which each owner, in the necessary and proper improvement of his own land, may get rid of as best he may, he is restricted and controlled by the maxim that one must so use his own as not unnecessarily to injure the property of another person. It is true that the owner may improve his land in an ordinary manner, though the effect may be to shed surface water over the lands of others, and may also collect such water by artificial means; but he must not thereby cause it to flow upon the premises of another in greater volume or quantity than it would naturally otherwise do. *Township of Blakely v. Devine*, 36 Minn. 53, (29 N. W. Rep. 342;) *Pye v. City of Mankato*, 36 Minn. 373, (31 N. W. Rep. 863.) See, also, upon this point, *Bellows v. Sackett*, 15 Barb. 96; *Foot v. Bronson*, 4 Lans. 47; *Jutte v. Hughes*, 67 N. Y. 267; *Livingston v. McDonald*, 21 Iowa, 160; *Miller v. Laubach*, 47 Pa. St. 154; *Gregory v. Bush*, 64 Mich. 37, (31 N. W. Rep. 90;) *Kelly v. Dunning*, 39 N. J. Eq. 482. Nor is it material that the increased and injurious volume and quantity of water was first discharged from the pipe upon defendant's land. The mode by which plaintiff was injured, whether by casting it directly upon her premises, by artificial means, after it had been gathered up, or by collecting, conducting, and discharging it upon defendant's land so near the imaginary line which separated his lot from that of the plaintiff that the increased and injurious quantity and volume upon the latter must necessarily be the result, is wholly immaterial. *Pye v. City of Mankato*, *supra*; *Bellows v. Sackett*, *supra*.

Judgment affirmed.

GEORGE C. RICHMOND vs. WILLIAM KOENIG.

June 18, 1890.

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Vendor and Purchaser—Marketable Title.—The rules announced by this court in *Townshend v. Goodfellow*, 40 Minn. 312, *Fairchild v. Marshall*, 42 Minn. 14, and *Hedderly v. Johnson*, Id. 443,—in respect to the marketability of a title to real property, applied to the facts of this case.

Plaintiff and defendant entered into a written contract for the sale, by the former to the latter, of 400 acres of land at the price of \$6,725. The agreement contained this provision: "Transfer shall be made, if title shall be found to be good, on the 11th day of June, 1888. If title is not good and cannot be made good within 11 days, then this shall be void. But if title is good, the party refusing to fulfil his contract shall pay to the other party the sum of \$500 as damages." The plaintiff brought this action in the district court for Wabasha county, to recover \$500 for defendant's refusal to perform. The defendant, among other things, pleaded that the title of plaintiff was not good by reason of three judgments docketed, respectively, December 31, 1884, February 19, 1885, and April 30, 1885, against one Lyman Gregg, the then owner of the land, the first judgment being for \$279.20, the second for \$3,100.38, and the third for \$116. In his reply the plaintiff admitted the docketing of the judgments, alleged that on November 19, 1884, Gregg made a general assignment of all his property not exempt from execution, for the benefit of his creditors, and has not since had any interest in the land subject to judgment liens. At the trial before *Start, J.*, (a jury being waived,) it appeared that plaintiff's title to all the land except 80 acres was derived under this assignment, and that the assignment was not recorded in the registry of deeds. The remaining 80 acres, with the buildings thereon, were acquired by plaintiff by deed from Gregg and wife on April 26, 1888. It was contended by plaintiff that these 80 acres were Gregg's homestead, and therefore not subject to the lien of the judgments. The evidence on this issue is stated in the opinion. The court found that the

judgments were not liens on any part of the 400 acres, and ordered judgment for plaintiff for \$500. The defendant appeals from an order refusing a new trial.

Wilson & Bowers, for appellant.

A. Z. Putnam and Lloyd Barber, for respondent.

COLLINS, J. It is evident that the plaintiff cannot recover in this action, unless he was in a position to coerce specific performance by the defendant of the contract involved herein. So that the prominent question in the case, and the only one which needs examination, is whether plaintiff, vendor, had and could have conferred upon the defendant, vendee, a marketable title—one clearly shown to be good, one free from reasonable doubt—to the 80-acre tract of land known as the "Gregg Homestead." If he had such a title, (and the trial court found that he had,) the order appealed from must be affirmed; otherwise it must be reversed. The subject to be discussed has very recently engaged the attention of this court in three important and well-considered cases. In *Townshend v. Goodfellow*, 40 Minn. 312, (41 N. W. Rep. 1056,) where the marketability of the title depended upon the existence of a fact about which there was doubt and uncertainty, it was said that where the title must be established by proof of matters of fact not of record, the case must be made very clear by the vendor to warrant the court in ordering specific performance; that while it is not necessary that the title should be shown to be bad, nor is it enough, even, that the court may on the whole consider it good, if there be doubt or uncertainty about it sufficient to form the basis of litigation, the purchaser could not be required to assume the risk and contest that doubt; and, repeating the remarks of the vice-chancellor in *Vreeland v. Blauvelt*, 23 N. J. Eq. 483: "A court of equity will not compel a purchaser to take a doubtful title. If there is such an uncertainty about the title as to affect its marketable value, even though a court might consider it good, still the contract may not be specifically enforced." Again, in the case of *Fairchild v. Marshall*, 42 Minn. 14, (43 N. W. Rep. 563,) the question was under discussion. There the doubt depended upon a question of law which was being litigated by the parties incidentally. It was therein remarked that a title to be marketable must be free from reasonable doubt; but if

v.43m.—31

it rests entirely upon record evidence, and the muniments of title are preserved and accessible, it will be a question for the court to determine upon their inspection,—a question of legal construction. The settled doctrine in England was also referred to, but without expressly sanctioning it, as declared in *Bell v. Holtby*, L. R. 15 Eq. 178, that when there is a doubt upon the validity of a title arising from a construction of an act of parliament, or the words of an instrument or will, it is the duty of the court to remove the doubt by deciding it, the decision removing the same. The most recent of the three cases mentioned, and the one most valuable and pertinent here, is that of *Hedderly v. Johnson*, 42 Minn. 448, (44 N. W. Rep. 527.) The doubt as to the marketability of the title therein involved arose upon a question of fact, as it does in the case at bar. It was there announced as the law that, when the doubt as to the title is raised upon a matter of fact, the question whether it is reasonable or not will not depend solely on the actual existence or non-existence of the fact as it may appear after a trial of it. If a trial be needed to ascertain it, and especially if its character be such, or if the evidence to show it be such, that it may be decided either way, or if the evidence be not readily accessible to the vendee so that he can establish the fact at any time when called upon, the marketable value of the title must surely be affected. On the other hand, if there is no doubt as to how the fact is, and it may be easily shown at any time, the title is not rendered doubtful by depending upon it.

It only remains for us to apply these general observations upon the subject of a marketable title to the facts in this case. The judgments against Gregg—from whom defendant vendor obtained his title on April 26, 1888—were entered and docketed in the months of December, 1884, and February and April, 1885. Gregg had owned and occupied the premises for many years prior to January, 1878. Having been elected sheriff, he removed at that time with his family to the county-seat, Wabasha, and resided there four years. He was next engaged in the hotel business at Lake City, in the same county, until August 1, 1884, his wife in charge the latter part of the two years. About July 1, 1883, he opened a new hotel at Wabasha, and on May 7, 1884, rented and opened another hotel in the same place.

Both houses were kept open until November 1, 1884, when Gregg assigned for the benefit of his creditors. On August 1, 1884, when his lease expired at Lake City, his wife and children, except one daughter, who had supervision of one of the Wabasha hotels, returned to the farm, the 80 acres in question, with an intent to remain. Two months later they joined Mr. Gregg at Wabasha, and have remained there since. The farm was not abandoned or rented, but all of the time it was carried on by Gregg by means of hired help, who occupied his dwelling, except a room or two reserved for the use of himself and his family. The day before making the assignment, October 31, 1884, Gregg duly filed the notice provided for by statute, in which he claimed the 80 acres as his homestead, under the laws of this state exempt from seizure and sale. His rights, if he had any under the homestead law, must be dated from August 1, 1884, the day his wife and family returned to the farm; for there is no pretence that he had not abandoned and lost such rights by his removal to Wabasha, in 1878. Now, while these facts, appearing as they did upon the trial below, may have justified a conclusion that the premises were a homestead and beyond the reach of the judgment creditors, and hence their judgments were not liens, can it be said, under the rules before stated, that the title was a marketable one? It must be borne in mind that whether it is or is not does not depend upon the actual existence or non-existence of the fact as it may have appeared after a trial. Was not the character of the prominent fact in this case such, and did not the evidence show it to be such, that the question of homestead might have been decided the other way? And is the evidence by which this important fact can be established readily accessible to the defendant vendee, so that he can easily show it at any time in the future, should occasion require? Is there not such a doubt and uncertainty about Gregg's homestead rights in the 80 as is sufficient to form the basis of litigation? Are there not debatable grounds presented by this record on which a doubt can be justified? If so, the title should not be declared marketable, although upon a trial, and with the evidence then at hand, a court might hold it good. These judgments are, *prima facie*, liens upon the premises. Each of these judgment creditors might assert a claim, and, should

each do so, three distinct trials would be inevitable in order to finally dispose of the *prima facie* character of the judgments. The fact that the creditors have not heretofore been heard from is no assurance that they will not be hereafter. The result of each of these trials would depend upon the ability of this defendant or his assigns to show that, after having abandoned his home upon this land in 1878, residing with his family and voting elsewhere for six years, Gregg became reinvested, so to speak, with a homestead right in the 80 acres, through a return thereto by his wife and children for a period of about two months, in the summer of 1884, while he, to all appearances, kept up and retained a previously acquired and conceded residence in Wabasha, to which place his family went after the few weeks' sojourn upon the farm, and where all have ever since resided. With these facts, the actual existence of the homestead is not free from doubt and uncertainty. Another court, or a jury, might not arrive at the same result from the evidence as did the court below. We do not wish to be understood as intimating that the homestead rights of Gregg were not established by satisfactory testimony, but, as we have already indicated, the existence or non-existence of the fact does not alone show the title free from doubt. Again, not only must the fact itself be free from doubt, but it must also be capable of being easily and readily proved at any time when it becomes necessary to prove it. From the nature (of necessity) of the testimony required to establish the main fact here, it cannot be said that it may be easily and readily proved at some future time. We conclude, therefore, that the proffered title was not free from reasonable doubt, and that the risk of litigation and embarrassment of a questionable title should not have been cast upon the defendant, vendee in the contract.

Order reversed.

BRUNO BEAUPRE vs. PATRICK V. DWYER, Receiver, impleaded, etc.

June 18, 1890.

48 485
50 170

Mortgage on Land and Chattels—Fixtures.—In a mortgage recorded as upon real estate, and also filed as on chattels, was the following description: "All that tract or parcel of land * * * described as follows, to wit: Lot No. two (2) of block No. twenty-seven, (27,) in * * *, together with the building or plant of said first party thereon situated, and the engines and boilers and fixed machinery appurtenant to said building." The mortgagor was a manufacturing corporation, and its building, engines, and boilers were fixtures when the mortgage was executed. The trial court found that certain other articles of machinery which were fastened to the building, and used for manufacturing, which, generally speaking, were heavy machines such as used about a foundry or machine shop, were included in and covered by the mortgage. *Held* correct.

Same—Rule for Construction.—In construing the descriptive portion of said mortgage, effect should be given to all of the words, terms, and expressions used therein; for it is obvious that by their use property was intended and included which was no part of the realty, and which would not pass by a mortgage upon it alone.

Same.—Written descriptions in such instruments are to be interpreted in the light of the facts known to and in the minds of the parties when they are executed.

Appeal by defendant, receiver of the Holland & Thompson Mfg. Co., from an order of the district court for Dakota county, Crosby, J., presiding, refusing a new trial.

C. D. & Thos. D. O'Brien, for appellant.

Charles M. MacLaren, for respondent.

COLLINS, J.¹ This controversy is between a mortgagee and the receiver in insolvency of the mortgagor, a manufacturing corporation. It arises in an action brought to foreclose the mortgage, which had been duly recorded as on real estate, and had also been properly filed as upon chattels. The description of the mortgaged property, as found in the mortgage, was as follows: "All that tract or parcel

¹Vanderburgh, J., took no part in this case.

of land * * * described as follows, to wit: Lot No. two (2) of block No. twenty-seven (27) of South Park Division No. ten, (10,) according to the recorded plat thereof, * * * together with the building or plant of said first party thereon situated, and the engines and boilers and fixed machinery appurtenant to said building." The trial court found, among other things, that, when the mortgage was executed and delivered, the mortgagor was engaged in the business of manufacturing in a large building, situated upon the land described in the mortgage; that certain articles therein—engine, pump, boiler, etc.—were fixtures, and about this there is no dispute; that certain other specially enumerated articles, found in a list numbered 2, were used in said building as machinery in carrying on said manufacturing business, were fastened to the floor or to some other part of the building by screw-bolts for the purpose of keeping them in position, and to keep them steady, so that they could be properly used; and also that the same could be removed from the building without destroying any part of it. The court further found that these articles, which, generally speaking, were heavy machines, such as are used in a foundry or machine-shop, were covered by and included in the mortgage. Their sale upon foreclosure was ordered, and the contention is over this machinery. Other articles of a lighter character, but also in use in said building and business, mentioned by the court in its list numbered 3, were declared not covered by the mortgage, and on this conclusion the parties do not differ.

From a reading of the description found in this instrument, it is manifest that the corporation intended to mortgage and convey, and that it was the intent of the mortgagee to cover and embrace in the mortgage, something more than the real property, with its hereditaments and appurtenances. If such was not the intention and understanding of the parties, a plain and simple description of the land alone would have been ample. Such a description would have included and mortgaged all of the articles found by the court, and now conceded by appellant's counsel, to have been fixtures when the mortgage was made. This simple description would have covered the building also, if, in fact, it was a part of the realty, and, as no special mention was made of it in the findings, we are safe in asserting that

it was. But the descriptive part of the instrument was much more particular and comprehensive than it would have been had it been designed to include the real property only, and hence the terms and expressions found in the description cannot be treated as meaningless, superfluous, and without value or significance. Effect must be given to the words, "together with the building or plant" of the mortgagor, and the words, "and fixed machinery appurtenant to the building," for it is obvious that by their use property was intended which was no part of the realty, and which would not pass by a mortgage upon it. It was within the province of the trial court to discover what was intended, and no complaint is made by the appellant of the methods adopted by the court in arriving at its conclusion that the machinery scheduled in list numbered 2 was that intended by the use of the words, terms, and expressions found in the description. In passing upon a question of this nature, evidence of the relations of the parties, situation of the property, and other surrounding circumstances, is admissible to show what was intended to be conveyed, and what is, and what is not, parcel of the subject-matter of the mortgage, and intended to pass thereby. It was not necessary that the property to be mortgaged should have been so described as to be capable of identification by a written recital, nor by the various names used to designate the different articles; for written descriptions in such instruments are to be interpreted in the light of the facts known to and in the minds of the parties at the time. *Eddy v. Caldwell*, 7 Minn. 166, (225;); *Tolbert v. Horton*, 31 Minn. 518, (18 N. W. Rep. 647;); *Comins v. Newton*, 10 Allen, 518; *Gurley v. Davis*, 39 Ark. 394; *Willey v. Snyder*, 34 Mich. 60. As it was largely a question of intent, we see no reason to be dissatisfied with the conclusion of the court below, and its findings must control.

Order affirmed.

OLE LARSON vs. ST. PAUL & DULUTH RAILROAD COMPANY.

June 18, 1890.

Negligence—Connection between Neglect and Injury — Burden of Proof.—On the trial of an action wherein negligence upon the part of the defendant is charged, whereby plaintiff was injured, it is not only incumbent on the plaintiff to show by competent evidence that there was a breach or neglect of legal duty by defendant, but that the injury sustained by the plaintiff was the direct and natural result and consequence of such neglect or breach. Mere surmise and conjecture that the negligence was the proximate cause of the injury is insufficient.

Appeal by plaintiff from an order of the district court for St. Louis county, *Stearns, J.*, presiding, refusing a new trial. The action was brought to recover \$5,000 damages for personal injuries.

Jens Jenswold, Jr., for appellant.

White & Reynolds, for respondent.

COLLINS, J. Plaintiff, while in defendant's employ as a laborer upon a ditching-machine built upon a flat-car, received an injury for which he sought to recover damages in this action. At the conclusion of the testimony the trial court dismissed the case. This was correct, and the order appealed from, refusing a new trial, must be affirmed. A description of the machine at this time would serve no good purpose, and the testimony as to how the plaintiff was injured was very indefinite and obscure. He stood upon the car, endeavoring to turn, as directed to do by the foreman, a large cog-wheel, which was a part of the windlass upon one of the derricks. In the absence of the crank ordinarily used for the purpose, plaintiff seized the spokes of the wheel with both hands, commenced to turn it, and in some way, plaintiff being unable to state exactly how, his thumb was caught between the cogs of the wheel he was turning and those of a smaller wheel into which they ran and matched, that the smaller might be put in motion. The plaintiff must have known that the crank usually on the wheel was missing, and both wheels, with their cogs, were in plain sight. The risks in handling such machinery were apparent and open to him, so that he knew them, or by the

exercise of ordinary care and ordinary observation should have known and understood them. He must have realized that injury would result if his hand should be drawn into the cogs as in turning the wheels they were brought in contact. The danger was obvious, and the risk was assumed by plaintiff when he undertook to move the large wheel by taking hold of its spokes.

But it is urged that plaintiff's hand was thrown into the cogs of the wheels because a rod, which, when in position, held the derrick in its proper place for service, at right angles with the floor of the car, had slipped out of position, and the derrick had revolved upon the pivot of its mast until its boom had swung around against the car, thereby jarring it, and throwing plaintiff off his balance. It was in evidence that this rod had previously and frequently become unfastened, and that this had occurred a short time before the accident. But, if there was any testimony tending to indicate that the displacement of the rod or the swinging of the boom caused the injury, or had anything to do with the catching of plaintiff's thumb in the cogs, it was altogether too vague and unsatisfactory upon which to base a verdict. It was a mere surmise upon plaintiff's part, arising, apparently, because he could not otherwise account for the accident. The upright mast, the boom suspended at an angle from it, and the stay-arm of the derrick—the arm being that part running from the top of the mast to the uppermost end of the boom—were heavy timbers framed and solidly bolted together, and the windlass, with its wheels, was a part of the mast, revolving with it, of course. As the boom came towards the car, and consequently towards the plaintiff, the wheels turned from him with the mast. The derrick was of great weight, and undoubtedly did, as plaintiff's witness testified, approach the car gradually. There was no claim that plaintiff was hit by the rod as it fell, or by the boom, or by any other part of the derrick; nor could this have occurred, owing to the manner in which the ditching-machine was constructed upon the car. It was not only incumbent upon the plaintiff to show by competent evidence that there was a breach or neglect of legal duty by defendant, but that the injury he sustained was the direct and natural result and consequence of such neglect or breach, and in this the plaintiff failed. To say

that the only negligence complained of—the dropping of the rod and the swinging of the boom—was the proximate and efficient cause of the injury, or that it was the result or consequence of either, would be mere surmise and conjecture, based solely upon the fact that the rod became unfastened, whereby the boom swung. Such a conclusion would not have been supported by the testimony.

Order affirmed.

STATE OF MINNESOTA *vs.* ANTON JOHNSON FRAMNESS.

June 19, 1890.

Seduction—Indictment.—The indictment *held* sufficient to show that the prosecutrix was at the time of the alleged offence a person of “previous chaste character.”

Verdict—Harmless Misnomer.—A slight error in entitling the verdict returned by the jury as “Farmness” for “Framness,” *held* immaterial.

Appeal—Bill of Exceptions—Errors not Shown in Return.—Where a case is brought up to this court upon a bill of exceptions, and the return does not purport to contain a record of any proceedings in the court below not set forth therein, or to be a complete transcript of the record in that court, no alleged errors will be considered in this court not affirmatively shown by the return.

Seduction—Penalty.—The penalty provided by section 242, Penal Code, is a fine, or imprisonment in the state’s prison, or both. But such punishment must be clearly defined, and cannot be in the alternative; and, where the measure of punishment intended to be inflicted is a fine only, the payment thereof cannot be enforced by imprisonment in the state’s prison until paid, or not exceeding a period fixed by the court.

Defendant was tried and convicted in the district court for Becker county, before *Mills, J.*, on an indictment for seduction under promise of marriage, and was sentenced to pay a fine of \$700, and, in default of payment, to be imprisoned at hard labor in the state prison until the fine should be paid, not exceeding 12 months. He appeals from the judgment and from an order refusing a new trial. The indictment, after charging defendant with seduction of the woman

named therein, under promise of marriage, describes her character as follows: "She the said" (naming her) "being, at the time of said seduction and said act of sexual intercourse, an unmarried female of chaste character previous to said seduction and said act of sexual intercourse."

O. Mosness and C. M. Johnston, for appellant.

Moses E. Clapp, Attorney General, and *Jeff. H. Irish*, for the State.

VANDEBURGH, J. 1. The error first assigned is the insufficiency of the indictment in failing to state with sufficient precision that the prosecutrix was at the time of the alleged seduction "a female of previous chaste character." There is nothing in the point. The statement is evidently intended to be made precise with reference to an objection of this kind. The indictment conforms to the statute, and the intent is clearly to charge that the offence was committed with "an unmarried female of previous chaste character."

2. A slight error in entitling the case by the jury in the verdict returned in writing was immaterial and without prejudice. It was rendered in the case actually on trial. It was not necessary to entitle it, and the mistake was in the transposition of a single letter only,—"*Farmness*" instead of "*Framness*."

3. The case is here upon a bill of exceptions which presents only the indictment, objection to evidence under it, the motion in arrest of judgment, the order denying a new trial, and the sentence. The appeal is from the order denying a new trial and from the judgment. The return does not purport to be a transcript of the record, of the minutes of the trial, or of any other proceedings in the trial court than we have mentioned. We may presume that the appellant caused so much of the record to be returned as was sent up, and as he deemed necessary for the purposes of the appeal, and if not complete, or if not in conformity with the truth, the omission might have been remedied, or the error corrected, upon a proper and seasonable application. As held in the case of *State v. Brown*, 41 Minn. 319, (43 N. W. Rep. 69,) there is nothing in the record in this court upon which to base the objection that the defendant was not arraigned or did not plead in the court below. It cannot be considered on this appeal. As to the practice in this court, see, further, *State v. Ryan*,

13 Minn. 843, (370;) *State v. Brown*, 12 Minn. 448, (538, 544;) *State v. Conway*, 23 Minn. 291; *Bilansky v. State*, 3 Minn. 313, (427.) There is no ground for a new trial disclosed by the record in this court, and the order denying it should be affirmed.

4. But in respect to the proceedings subsequent to the verdict, we think the defendant's objection to the form of the sentence is well taken. The crime is by the statute (Pen. Code, § 242) made punishable by imprisonment in the state's prison for not more than five years, or by a fine of not more than \$1,000, or by both. But whether punished by imprisonment only, or by both fine and imprisonment, in either case the term must be made definite and certain. But in this case it is evident that the intention was to impose a fine as the measure of the punishment, and that the imprisonment in the state's prison provided for was not by way of punishment for the crime, but to enforce the payment of the fine. *State v. Peterson*, 38 Minn. 143, 149, (36 N. W. Rep. 443.) For such purpose imprisonment in the county jail is alone warranted. Pen. Code, § 525. There was no legal warrant for imprisonment in the state's prison until the payment of the fine. But, as this error is subsequent to the verdict, the conviction will stand, and under Gen. St. 1878, c. 117, § 9, we think the judgment or sentence may be vacated, and a lawful one pronounced, which may more properly be done by the court which tried the case. The practice was settled in *Mims v. State*, 26 Minn. 494, (5 N. W. Rep. 369.)

Judgment vacated, and the case is remanded to the district court of Becker county for sentence upon the verdict rendered therein.

ORLANDO C. MERRIMAN and others vs. A. N. KNIGHT and others.

43	493
63	306

June 19, 1890.

Taxes—Designation of Newspaper—Filing of Resolution.—The filing, in the office of the clerk of the court, of a certified copy of the resolution of the board of county commissioners, designating the newspaper in which the delinquent-tax list is to be published, is a jurisdictional prerequisite to a valid publication of the list, and the omission to do so renders the judgment entered thereon void.

Ejectment for lands in Mille Lacs county, brought in the district court for that county, and tried by *Searle, J.*, (a jury being waived,) who found that on May 27, 1884, the plaintiffs were owners in fee, and on that day paid to the county treasurer the taxes for 1883, being all the taxes then unpaid, and took his official receipt therefor. The county auditor, however, included the lands in the delinquent list filed in June, 1884, and published; judgment was rendered, and the lands were offered for sale thereunder, and were bid in by the state on September 16, 1884. On August 10, 1886, the defendants obtained an assignment of the interest of the state. The delinquent list was published in a newspaper properly designated for that purpose by resolution of the county board, but no copy of the resolution was ever filed in the office of the clerk of the district court. The court held that this omission made the tax judgment void, and ordered judgment for plaintiffs, which was entered, and the defendants appealed.

Little & Nunn, for appellants.

Benton & Roberts, for respondents.

MITCHELL, J. Gen. St. 1878, c. 11, § 72, provides that the newspaper in which the publication of the delinquent-tax list shall be made "shall be designated by resolution of the board of county commissioners, * * * a copy of which resolution, certified by the county auditor, shall be filed in the office of the clerk of the court." In *Eastman v. Linn*, 26 Minn. 215, (2 N. W. Rep. 693,) it was held that "the publication operates as a constructive service of

the notice and list upon the party whose property is to be affected by the proceeding, and, to be effectual for any purpose, the mode of making it pointed out by the statute must be strictly complied with." This was followed in *Russell v. Gilson*, 36 Minn. 366, (31 N. W. Rep. 692,) in which it was also said that the purpose of the resolution designating the paper is not merely to direct how the notice and list should be served, but was intended as notice to the tax-payer, so that, by examining it, he might be able to ascertain with certainty in what newspaper to look in order to see whether any proceedings had been commenced against his land. In both these cases the board had failed to pass any resolution properly designating the paper; in the present case, a proper resolution had been passed by the board, but no copy of it was filed in the office of the clerk of the court as required by the statute. But we can see no distinction in principle between the cases. The filing of a certified copy of the resolution with the clerk of the court is just as imperatively required by the statute as is the adoption of the resolution itself. Both are equally prerequisites to the publication of the list, and the one can no more be dispensed with or disregarded than the other. Both are designed, in part at least, for the benefit of the tax-payer by giving him notice in what paper he shall look to see whether proceedings have been commenced against his land. It is no answer to this to say that he may get this information by searching for the resolution in the records of the proceedings of the board as kept by their clerk. The statute requires it to be filed with the clerk of the court, and the tax-payer has a right to look there for it. The defendant urges, as a reason why the omission to file the resolution of the board with the clerk of the court should not be held jurisdictional, that where the county auditor designates the paper, upon the failure of the board to do so, the statute does not require his designation to be filed with the clerk. We are by no means prepared to concede that the provision as to filing with the clerk does not apply to a designation by the auditor as well as to one by the board. But, even conceding that it does not, the inference sought to be drawn from that premise by no means follows. If the legislature has in one case made a provision for the benefit of the tax-payer, which it has failed

to make in the other case, this is no ground for holding that the provision made in the former is immaterial or non-essential. In our opinion, the filing of this resolution with the clerk of the court was a jurisdictional prerequisite to a valid publication of the list, and the omission to do so renders the judgment entered thereon void.

Judgment affirmed.

SCHOOL-DISTRICT No. 31 OF LE SUEUR COUNTY *vs.* PATRICK ROACH
and others.

June 19, 1890.

Judgment against School-District—From what Fund Payable.—Gen. St. 1878, c. 36, § 119, authorizes the treasurer of a school-district to pay a judgment against the trustees of the district only out of money not otherwise appropriated. He has no authority to do so out of moneys of the district applicable only to other specific purposes.

Action against a former treasurer of plaintiff and the sureties on his bond, to recover a balance of \$64.46, alleged to be still in the treasurer's hands, with interest. Defence, payment of \$41.40 on a judgment against plaintiff, and tender of \$23.06 to plaintiff. At the trial in the district court for Le Sueur county, before *Edson, J.*, the plaintiff had a verdict for the full amount claimed by it. The defendants appeal from an order refusing a new trial.

Francis Cadwell and *J. B. O'Malley*, for appellants.

M. R. Everett, for respondent.

MITCHELL, J. The only question in this case is whether the defendant Roach was entitled to a credit in his accounts as treasurer of the plaintiff school-district for the amount of an alleged judgment against the district, which he had assumed to pay out of school moneys in his hands. Gen. St. 1878, c. 36, § 119, provides that "when a judgment is recovered against any trustees in any action prosecuted by or against them in their name of office, no execution shall issue on such judgment; but the same, if for the recovery of

money, shall, unless reversed or stayed on appeal, be paid by the treasurer, upon demand and the delivery to him of the certified copy of the docket of the judgment, if there is sufficient money of such district in his hands *not otherwise appropriated.*" This power of the treasurer to pay judgments is a rather dangerous one, as is illustrated by the present case. But it is only out of money "not otherwise appropriated," that he has any authority in any case to pay judgments. He cannot do so out of moneys raised for and applicable only to other specific purposes. According to defendant's own report as treasurer, which is in no way explained or contradicted, all the money which was in his hands was applicable only to certain specific purposes enumerated in the report, of which the payment of this judgment was not one. Hence, assuming that the evidence showed a valid judgment against the school-district, (of which there may at least be doubt,) the defendant had no right to pay it out of these funds. This point, upon which there was no conflict of evidence, being decisive of the case, the errors assigned as to other matters are immaterial.

Order affirmed.

JOHN T. GUIRNEY vs. ST. PAUL, MINNEAPOLIS & MANITOBA RAILWAY COMPANY.

June 20, 1890.

Master and Servant—Acts of Servant in Violation of Injunction—

Master's Liability to Indemnify.—Where the servant of a corporation does acts in obedience to its orders which are in violation of an injunction restraining such acts, or which amount to a trespass, and such servant has no notice of the injunction or the invalidity or wrongfulness of such acts, or of any liability or danger of arrest likely to be incurred in the performance thereof, and such liability and threatened danger are known to his principal, but concealed from him, the principal is bound to indemnify him for the damages suffered by him as the natural result of his acts done in obedience to the orders of his superiors.

Same—Grounds of Master's Liability.—And the liability of the principal does not, in such case, depend upon the ultimate determination of the

question as to whether an alleged trespass by or upon the servant is or is not legally justifiable, or as to the legality or propriety of the issuance of the injunction. But the master may not wilfully expose his servant to danger of loss or injury in the course of his employment, the risk of which is known to him, but notice of which is wrongfully withheld from the servant.

Action brought in the district court for Ramsey county, to recover \$10,000 damages on the cause of action stated in the opinion. The action having been brought on for trial before *Wilkin, J.*, the court, on defendant's motion, ordered judgment in its favor on the pleadings. The plaintiff appeals from an order refusing a new trial.

John W. Willis, for appellant.

Flandrau, Squires & Cutcheon, for respondent.

VANDEBURGH, J. The controversy in this case grows out of an attempt by the Fargo Southern Railroad Company to make a crossing over the track and road-bed of the defendant at Wahpeton, Dakota. The plaintiff was foreman of railway repairs and construction for the defendant, and was directed by it to repair its track, which had already been cut and injured at the place in question, and to prevent the Fargo Company from interfering with the track of his company, and to protect the same from further injury or molestation. These instructions were obeyed by the plaintiff, and while he was so engaged he was arrested upon a warrant issued out of the district court of Dakota territory, for contempt in violating an injunction order previously issued by that court in a suit of the Fargo Company against this defendant. This order commanded the defendant company, its agents, attorneys, and assistants, and each of them, to desist and refrain from doing or causing to be done any act or thing which would in any manner interfere with or prevent the Fargo Company from building its road over the land in dispute upon which the proposed crossing had been attempted. The order was duly served upon the defendant, but plaintiff alleges that he had no notice of it, and was not informed of its existence by the defendant, but that the defendant concealed from plaintiff the fact of the issuance of the order, and in defiance thereof issued further orders to the plaintiff to repair and preserve intact the defendant's track, and di-

rected him to oppose, and if possible prevent, the crossing thereof by the Fargo Company, the plaintiff in the injunction suit, which acts were in fact, as he alleges, in violation of the injunction order; and while the plaintiff was proceeding to execute his orders, but in ignorance of the injunction, he was arrested, as before stated. This action is brought for the damages suffered by the plaintiff on account of his arrest and detention under the warrant, and is based upon the alleged wrongful acts and misconduct of the defendant in exposing him as its servant to the danger of an arrest for the violation of the injunction, which danger was known to the defendant, but concealed from the plaintiff. It is also alleged in the complaint that the defendant *knew* that the commission by him, under its direction, of any act prohibited by the injunction, would subject the plaintiff to great danger of arrest and imprisonment. The defendant, among other things, alleges in its answer that the plaintiff appeared before the court which issued the injunction order, to answer the charge of contempt, and that, after investigation and inquiry, an order was duly made and entered by the court in such proceeding, adjudging the plaintiff to be innocent of any violation of such injunction order, and discharging him from arrest, and that the order was vacated and discharged as against the defendant also. The reply denies that there was any investigation or inquiry by the court into the alleged contempt, and avers that the action of the court in the premises was in pursuance of a stipulation between the counsel of the respective parties, and not upon inquiry.

It is proper to say that the defendant's answer takes issue upon many of the allegations of the complaint upon which the plaintiff relies to support the liability of the defendant. But at the trial the defendant moved for judgment on the pleadings, and the motion was granted; and this appeal brings up for consideration here the propriety of that decision. For the purposes of the motion, the truth of the allegations in the complaint was necessarily assumed, while the averments in the answer not admitted by the reply were to be taken as untrue or not established. Upon that motion, however, the orders dismissing the injunction proceedings against the defendant and its agents, including this plaintiff, together with the stipulations of

the attorneys of the respective parties consenting to such dismissal, were by consent received and considered by the court. The question then recurs whether, upon the record thus presented, the motion for judgment in this action was warranted. It is true that, if the plaintiff had in fact no notice of the injunction, and in ignorance of it was in good faith executing the orders of the defendant, he did not render himself legally liable to be punished for contempt; but the circumstances of the case must be carefully considered in determining in respect to the dangers to which plaintiff was exposed. There was an attempt on defendant's part to resist, by physical force and strong hand, an attempt by the Fargo Company to construct the railway crossing. If the complaint is true, the defendant's directions, and plaintiff's acts in pursuance thereof, were in violation of the injunction, and were unlawful, as long as the injunction was pending; and, whatever may have been the grounds upon which the court dismissed the proceedings, it does not follow that there was not a *prima facie* case made upon which the order against the plaintiff was issued.

The complaint alleges that the defendant exposed the plaintiff, in the manner recited, to the danger of an arrest for a contempt, without notice to him, and that it knew that the plaintiff would be liable to be subjected to such danger. We may infer, from the conceded facts and the peculiar circumstances, that some proceedings would be likely to be taken to prevent or punish a violation of the injunction by defendant's servants. And so, if the defendant had, as is alleged, reason to expect such results to its servants while in good faith engaged in its service, without notice of the injunction, it would seem right and just that they should be indemnified for the injuries suffered by them as the result of their obedience to defendant's orders. And the defendant's liability does not depend upon the ultimate determination of the question as to which of the contending parties is legally right in respect to the title of disputed property, or the legality or propriety of the injunction order, or the sufficiency of the service thereof. The master may not expose his servant to danger from a wrong-doer or trespasser without proper warning. *Moore v. Appleton*, 26 Ala. 633; *Baxter v. Roberts*, 44 Cal. 187. The proposition upon which plaintiff relies to sustain his

cause of action is, in brief, that the defendant was bound to indemnify him against loss and damage suffered in the course of his employment, the risk of which the defendant understood, but wrongfully withheld from him such notice as was necessary for his protection. We think there is sufficient in the complaint to support this contention, and that the case should have proceeded to trial on the merits.

Order reversed.

WILLIAM P. TODD vs. O. A. RUSTAD, County Auditor, and others.

June 20, 1890.

Removal of County-Seat—Contest—Procedure.—The statute (Gen. St. 1878, c. 1, § 55) has provided a summary and adequate mode of procedure for contesting the validity and regularity of the proceedings instituted and carried on for the removal of county-seats.

Same—Proceeding under Void Act—Injunction.—But an action for a permanent injunction restraining the removal of the county offices, and the erection of public buildings, may be maintained by citizens and taxpayers where there is an entire absence of legal authority to initiate the proceedings for the removal of a county-seat, as where they are taken under an unconstitutional law.

Same—Act Held Valid.—Laws 1889, c. 174, *held* constitutional.

Same—Injunction Properly Dissolved.—The dissolution of the temporary injunction issued in this action *held* sustained by the evidence before the trial court.

Appeal by plaintiff from an order of the district court for Traverse county, *C. L. Brown, J.*, presiding, dissolving an injunction.

John S. Noble, A. S. Crossfield, and Cole, Bramhall & Morris, for appellant.

John I. Place, Henry Johns, and J. W. Reynolds, for respondents.

VANDERBURGH, J. Upon the complaint and affidavit of the plaintiff in this action, an injunction was issued restraining the defendants, county officers of the county of Traverse, from removing the offices, records, and other property of the county from Brown's Val-

ley, heretofore the county-seat of that county, to Wheaton, in the same county. It is alleged in the complaint that proceedings for the removal of the county-seat to Wheaton had been taken under Laws 1889, c. 174, and that, after petition and vote of the electors upon the question, the county commissioners of the county were about to declare the county-seat removed from Brown's Valley to Wheaton, and that the defendants, county officers, were threatening to remove their several offices to the latter place; and it is further alleged that plaintiff is a resident and freeholder of the county of Traverse, and has large property interests in Brown's Valley, and is specially and pecuniarily interested in the retention of the county-seat at that place, and would be greatly damaged by its removal; and it is also averred and claimed that the proceedings were irregular, and not in conformity with the statute, and also that the act of 1889 is unconstitutional and void, and "that there is now pending in the courts of this state an action relative to the removal of said county-seat from the village of Brown's Valley." The relief asked in the complaint was for a permanent injunction, restraining the defendants and their successors in office from removing the records and property of the county from Brown's Valley. Thereafter the defendants, upon affidavit denying the alleged irregularities in the proceedings for the removal of the county-seat, and showing them to be in all respects in conformity with the act referred to, and showing that, upon the special election held, in pursuance of that act, to determine the question of the removal of the county-seat, 740 legal voters voted for the change, and 199 voted against it, moved for a dissolution of the temporary injunction, and the court granted the motion; and from its order dissolving it the plaintiff appeals to this court.

1. As respects proceedings instituted and carried on for the removal of county-seats, the statute has provided a summary and adequate mode of procedure for contesting their regularity and validity. The county officials and the public generally may assume that there will be no contest involving such questions unless the same is instituted within 30 days after the vote is declared. The courts will not, therefore, entertain an independent action for a permanent injunction, the determination of which must necessarily involve the investigation and

trial of questions which would be properly investigated and finally disposed of in a statutory contest. That would be equivalent to allowing a contest to be made by suit independently of the statute.

2. An action for a permanent injunction restraining the removal of a county-seat, or the expenditure of public funds, or the creation, unlawfully, of public indebtedness for the erection of county buildings, may, however, be maintained on the ground of an entire absence of legal authority to do the acts complained of, as where the proceedings threatened are under a statute which is unconstitutional, and are wholly unauthorized and void. We see no reason why a citizen and tax-payer should not in such case have the same right to his remedy by injunction, in a proper case, to restrain the unlawful removal of the county offices as to his remedy by *mandamus* to compel their restoration to the county-seat. *State v. Weld*, 39 Minn. 426, (40 N. W. Rep. 561;) 2 High, Inj. § 1321.

3. The point is made by the plaintiff that the act of 1889 is unconstitutional, and the relief asked is in part predicated on that ground; but it is not specially argued, and, in so far as our attention is drawn to the subject by the suggestions of counsel, the objection does not seem to us to be well taken. The act appears to have been so drawn as to meet the objections to the act of 1885, (c. 272,) which were considered in *Nichols v. Walter*, 37 Minn. 264, (33 N. W. Rep. 800.) The further objection that the act confers judicial power upon the county commissioners is answered in *State v. Ueland*, 30 Minn. 29, (14 N. W. Rep. 58;) and the authority conferred by the amendment to the constitution requiring that the legislature shall make provision for changing county-seats gives the legislature full control over the subject, and so abrogates the previously existing provision requiring the question to be submitted at a general election. *Nichols v. Walter*, *supra*.

4. Conceding for the purposes of this case, but without considering or deciding the point, that the removal of the county offices might, upon a proper showing, be restrained during the pendency of a statutory contest regularly instituted, still, in the absence of any statutory direction on the subject, it must be deemed a matter resting in the sound judicial discretion of the court in which the contest is pend-

ing. But in this case it is not shown that such contest had been instituted. It is alleged only that an action relative to the removal of the county-seat is pending, and there was clearly no abuse of discretion on the part of the court in dissolving the temporary injunction in this case, upon the affidavit of the defendants above referred to.

Order affirmed.

PETER HEFFINGER vs. MINNEAPOLIS, LYNDALE & MINNETONKA RAILWAY COMPANY.

June 20, 1890.

Contributory Negligence.—Evidence of plaintiff's contributory negligence held such as to justify the trial court in refusing to submit the case to the jury.

Appeal by plaintiff from an order of the district court for Hennepin county, *Hicks, J.*, presiding, refusing a new trial, the action (brought to recover \$4,850) having been dismissed at the trial at the close of the evidence for plaintiff.

John H. Steele, Steele & Rees, and B. Davenport, for appellant.

M. B. Koon, for respondent.

VANDERBURGH, J. The action of the trial court in dismissing this case upon the trial, at the close of the testimony offered by the plaintiff, is clearly warranted by the evidence showing the contributory negligence of the plaintiff. It is therefore entirely unnecessary to consider the question of defendant's negligence, or the alleged errors of the court in its rulings upon testimony offered upon that branch of the case. The plaintiff was a laborer engaged in working upon a sewer then in process of construction in one of the streets of the city of Minneapolis, in which the tracks of the defendant were laid over which it operated its trains. The track then used had been removed over to the west side of the street, so as not to interfere with the work upon the sewer, and all the trains running both ways passed over this track. A portion of the dirt from the sewer was thrown out

on the west side, and was piled up between the sewer and track, back to the point where the filling had been completed. Plaintiff had been at work a considerable distance from this point, and at the time in question had been ordered to go back there and assist in filling, and in doing so passed down on the west side of the sewer, and between it and the defendant's track, on or along the dirt-pile which extended down to the track, and rendered the passage-way difficult and dangerous. While walking along the dirt-pile, and too near the track for safety, he suffered his attention to be drawn to the work on the sewer, and while so occupied was overtaken by the train, and was injured. The material facts are undisputed. He could have passed along the sidewalk with safety. The track was straight, and the view was sufficiently open and unobstructed, so that, with the exercise of ordinary care, he could have looked back and observed the approach of the train, and got out of the way seasonably. He knew the cars ran along there frequently, and he knew the place was dangerous, because of the proximity of the track. And it is as dangerous to be too near as upon the track. The plaintiff unquestionably was careless and negligent. He could not, therefore, recover. *Donaldson v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 293, 298; *Marty v. Chicago, St. Paul, M. & O. Ry. Co.*, 38 Minn. 108, (35 N. W. Rep. 670;) *Reed v. Minneapolis Street Ry. Co.*, 34 Minn. 557, (27 N. W. Rep. 77.)

Order affirmed.

ED. S. BEAN, Sheriff, *vs.* PAUL SCHMIDT.

June 20, 1890.

Void Assignment for Creditors—Levy by Judgment Creditor—Subsequent Proceedings in Insolvency.—Where a voluntary assignment made by a debtor under Gen. St. 1878, c. 41, is absolutely void, a creditor who has acquired a judgment in an action wherein the complaint was duly filed twenty days or more prior to the entry thereof, and who has levied, under an execution issued thereon, upon property in the hands of the assignee, before any proceedings for the appointment of a receiver, under Laws 1881, c. 148, are taken, will be preferred; and such proceedings will be without prejudice to his lien acquired by virtue of the levy.

Same—Estoppel to Question Levy.—Parties who base their petition on the fact that such levy has been made will not afterwards be heard to dispute the validity thereof.

Same—Levy, how Enforced.—The sheriff may enforce the levy by action to recover the property, or collect the money levied on in the hands of the assignee.

Appeal by defendant from an order of the municipal court of St. Paul, refusing a new trial after trial by the court and judgment of \$171.48 ordered for plaintiff.

Butts & Jacques and *Albert B. Ovitt*, for appellant.

Chapin & Sauer, for respondent.

VANDEBURGH, J. Defendant is the assignee of Blissenbach & Zelzer by an assignment which, it is admitted, was void on its face. It was dated June 19, 1888, and under it the defendant took possession of the assigned property, and converted it into money as assignee, and held the same in his hands on the 15th day of June, 1889. On the 14th day of June, 1889, Degraw and others had recovered a valid judgment against the assignors, Blissenbach & Zelzer, upon a complaint filed May 23, 1889, more than twenty days prior to such judgment, which they were therefore entitled to enforce against the property of the judgment debtors; and on June 15, 1889, an execution was issued thereon to the sheriff, who thereupon, on the same day,

levied upon "any and all indebtedness, money, debts, or credits in the hands of the assignee due and accruing to the judgment debtors." Thereupon, on the 1st day of July, 1889, the St. Croix Lumber Company, a creditor of the judgment debtors, as petitioner, applied to the court for the appointment of a receiver, setting up in its petition, among other things, the facts above recited, including the levy referred to; and the court, having heard the petitioner and the parties interested, including the assignee, assignors, and the judgment creditors above mentioned, granted the petition. The application was based upon the fact of the levy by the sheriff as aforesaid, the failure of the judgment debtors to take any proceedings to vacate the same, and the insolvency of the judgment debtors. The validity of the levy was admitted by all the parties hereto, and they are concluded by the determination of the court thereon in that proceeding. It is also found by the trial court that the assignee had at the time of the levy sufficient moneys, realized from the assigned property, to pay the judgment in question. After the appointment of the receiver, this action was brought to collect the amount of the execution by virtue of which the levy was made.

1. The judgment against Blissenbach & Zelzer was valid, and the appointment of the receiver was without prejudice to the lien acquired by the levy upon the moneys in defendant's hands. *In re Jones*, 33 Minn. 405, (23 N. W. Rep. 835;) Laws 1881, c. 148, § 1; Laws 1889, c. 30. And the sheriff was entitled to proceed and enforce the levy, and the application of the receiver to be permitted to intervene in this action was properly denied. The defendant, in view of his solemn admission of record, in the application for a receiver, of the fact of the issuance and levy of the execution as alleged in the petition, cannot now be heard to question the validity of the execution and the fact of the levy, as found by the court herein.

2. The defendant held in his hands the moneys received from the sale of defendant's goods, and subject to levy. Conceding the sufficiency of the levy, the plaintiff, as sheriff, might proceed by action or other proper remedy to compel payment of the amount for which the levy was made. The point is made, apparently for the first time in this court, that no demand was alleged or proved in this case before

suit brought. But we think it is apparent that this fact was not relied on by the defendant; and his answer shows that he denies the plaintiff's right to the possession, and alleges affirmatively that the receiver is entitled thereto. So that it is sufficiently clear from the record that a demand would have been unavailing.

Order affirmed.

HENRY LAMB vs. WILLIAM B. SHAW and others.

June 20, 1890.

Action on Injunction Bond—Measure of Damages.—In a suit upon a statutory injunction bond, only such expenses for counsel fees can be considered or included in the damages for a breach of the condition therein as are shown to have been necessarily incurred in procuring a dissolution of the injunction.

Same—Counsel Fees.—Expenses for services of counsel, incurred in abortive attempts to set aside the same, or in the regular conduct of the trial, and necessarily incident thereto, independently of the allowance of the temporary injunction, are not to be allowed in such suit.

Appeal by plaintiff from an order of the district court for Ramsey county, Vilas, J., presiding, sustaining a demurrer to the complaint.

Johns, Michael & Johns, for appellant.

C. M. MacLaren, for respondents.

VANDERBURGH, J. This action is brought to recover damages upon an injunction bond, being, as plaintiff claims, the amount of the expenses incurred by him for counsel fees, upon applications to set aside the preliminary injunction issued by the court in an action brought by defendant Shaw against this plaintiff, to restrain the enforcement of a certain judgment previously recovered by the plaintiff against him and others, and upon the trial of the principal action. The applications were denied, and the injunction retained until the trial, when the action was dismissed upon the motion of this plaintiff, upon the default of the defendant Shaw to appear and prosecute the same. The temporary injunction is a provisional remedy, which

may be allowed upon a proper showing before trial, by the court, pending the principal action, "when it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief * * * consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce injury to the plaintiff," etc. Gen. St. 1878, c. 66, § 200. The substance of the complaint in the injunction suit is not fully disclosed by the complaint in this action, but we must presume that it stated substantive facts sufficient on its face to warrant the relief asked, and which would be the proper subject of litigation between the parties. If, as would seem to be the case, the question involved was the validity of a judgment upon which the execution sale was sought to be restrained, the determination of that question would not necessarily cease to be important or material to the plaintiff's rights in that suit, though the sale was not temporarily restrained, and he might be embarrassed and prejudiced by the proceedings. Presumptively, therefore, the litigation in the principal action would proceed and be determined on its merits, though no temporary injunction had been issued. We must presume, also, that the motions to dissolve the injunction, upon the record before the court, were properly denied, and that the expenses for counsel fees incurred upon the trial of the principal action were such as were incident to such trial, and they are not, therefore, to be treated as expenses incurred in procuring a dissolution of the injunction. The services were such as were rendered in the regular conduct of the case, and as would necessarily have been rendered independently of the injunction. The bond upon which this action is brought is in the form required by the statute, and is conditioned to pay the party enjoined such damages as are sustained by reason of the writ, if the court finally decide that the party was not entitled thereto. The plaintiff was entitled to recover damages shown to have been suffered by him by reason of the preliminary injunction, but we do not think the counsel fees sued for in this action can be properly included therein. His expenses in abortive attempts to set it aside, and, as we have seen, upon the trial of the principal action, are not within the terms of the bond. In *Corcoran v. Judson*, 24 N. Y. 106, the terms of the bond were

broad, and the rule there applied is distinguished in later cases. We are not disposed to extend the general rule as stated in *Frost v. Jordan*, 37 Minn. 544, (36 N. W. Rep. 713.) See *Rose v. Post*, 56 N. Y. 603; *Cook v. Chapman*, 41 N. J. Eq. 152; *Noble v. Arnold*, 23 Ohio St. 264, 270; *Newton v. Russell*, 87 N. Y. 527; *New Nat. Turnpike Co. v. Dulaney*, 86 Ky. 516, (6 S. W. Rep. 590;) *Bustamente v. Stewart*, 55 Cal. 115.

Order affirmed.

H. WADSWORTH vs. J. J. F. BLAKE.

June 20, 1890.

Mortgage—Payment—Subrogation.—Where one claiming title to land voluntarily discharged a mortgage thereon given by his grantor, and a third party is subsequently adjudged to be the owner in fee, these facts are not alone sufficient to entitle the former to have the amount so paid adjudged a charge upon the land as against the latter.

Appeal by plaintiff from an order of the district court for McLeod county, *Edson, J.*, presiding, sustaining a demurrer to a complaint which stated the facts in substance as follows: On and long prior to December 20, 1875, one E. O. Huntington was owner in fee of certain described land in McLeod county, and on that day executed to one Gifford a mortgage thereon, with power of sale, which was duly recorded, and continued to be until satisfied by plaintiff a valid lien on the land. On April 22, 1880, the mortgage was duly foreclosed by sale under the power, one Dewees being the purchaser at the price of \$670, and receiving the proper sheriff's certificate, which was recorded four days later. On May 1, 1878, Huntington conveyed the land to one Shoutz, who on February 9, 1880, conveyed to plaintiff, who has ever since been owner in fee, except as hereinafter stated. On February 24, 1882, plaintiff brought suit against Dewees (the purchaser) and the sheriff for redemption of the land from the foreclosure sale, which suit was tried at the May term, 1882, and on February 1, 1884, judgment was entered adjudging plaintiff to be the owner

of the land, and as such owner entitled to redeem from the sale. In pursuance of this judgment and in good faith, and for the purpose of redemption from the sale, the plaintiff on April 10, 1884, paid the full amount of the mortgage, with costs of foreclosure, etc., thereby fully satisfying it. Before this action was brought, the defendant brought suit against plaintiff in the same court to quiet title to the land, in which suit, on February 21, 1887, judgment was rendered adjudging this defendant to be owner in fee of the land and this plaintiff to have no title thereto. The prayer for judgment is that the sum of \$724.06 so paid by him, with interest, be decreed to be a charge on the land, and for a sale of the land to satisfy it.

W. F. Schoregge, for appellant.

Little & Nunn, for respondent.

VANDEBURGH, J. The complaint shows that, while plaintiff claimed to be owner in fee of the premises in question here, he paid off and discharged, by way of redemption from a foreclosure sale, a mortgage given by his grantor, one Huntington, upon the land, and which he alleges was a valid lien and charge thereon. Subsequently this defendant recovered a judgment against him, by which plaintiff was adjudged to have no title to the premises, and the defendant was decreed to be the lawful owner of the land. The origin or source of defendant's title or when acquired does not appear. Upon these facts plaintiff asks, in substance, to have judgment in his favor declaring the sum paid by him for the redemption of the premises from the mortgage above referred to, to be a lien or charge upon the land by reason of the facts above stated. There does not appear to be any ground, legal or equitable, upon which such a claim can be supported upon the facts alleged. It does not appear that defendant owes plaintiff any duty in respect to the land, or otherwise to reimburse him, or to have the lien of the mortgage restored, or the amount paid to discharge the same made a charge on the land.

Order affirmed.

JAMES M. PULLIAM vs. CHARLES E. ADAMSON.

June 20, 1890.

Promise for Benefit of Third Person—Action.—Where a mortgagee in a chattel mortgage promised, in consideration of a surrender and delivery to him of the mortgaged property by the mortgagor, to pay the amount due upon a second mortgage to the holder thereof, *held* a valid agreement, which might be enforced by such second mortgagee.

Evidence—Authority of Agent.—Evidence *held* sufficient to support a finding by the jury that the contract sued on, which was made by an agent, was duly authorized by the defendant.

Appeal by defendant from an order of the district court for Hennepin county, *Lochren, J.*, presiding, refusing a new trial after verdict of \$154.97 for plaintiff.

Merrick & Merrick, for appellant.

Charles L. Smith, for respondent.

VANDEBURGH, J. The questions submitted to the jury under the pleadings and upon the evidence in this case were (a) as to the alleged promise and agreement of the defendant, through his agent, William H. Adamson, to pay the plaintiff the sum of \$140, under the circumstances and upon the consideration set forth in the complaint; and (b) the authority of W. H. Adamson to make such promise or agreement.

1. It is alleged by plaintiff, and his evidence tended to show, that he had released a chattel mortgage upon a span of mules and other property held by him, and made by one Brady, in order to enable Brady to raise money by another mortgage on the same property, which thereupon became a first mortgage, and had taken a second mortgage thereon. Brady's new mortgage was made to the defendant to secure \$150, which the plaintiff claims was subsequently paid in full by him. And afterwards, the mortgaged property having been removed to Ashland, in Wisconsin, where Brady was residing, the defendant's agent, W. H. Adamson, went there, and procured a surrender and delivery thereof to him as agent of the defendant by

Brady, in settlement of the defendant's claim, and upon the further consideration and express promise and agreement that he would pay the amount due plaintiff on his mortgage, amounting to the sum of \$140. This action is brought by plaintiff to recover upon that promise. There is sufficient evidence upon this branch of the case to sustain the finding of the jury in plaintiff's favor, and there is no doubt that such agreement was valid as an original undertaking, and was made upon a sufficient consideration; and, having been made expressly for plaintiff's benefit, he may maintain an action thereon against defendant, if the agent was authorized to bind him.

2. The trial judge was of the opinion that the evidence of the agent's authority was sufficient to warrant its submission to the jury, and in this he is, we think, sustained by the record. There is evidence tending to show that he had for several years been loaning money for defendant, and was intrusted with the entire management of the business, having general authority to act for the defendant therein; and besides, if the defendant has accepted and retained the fruits of this contract and arrangement with Brady, he must be bound by its obligations. Assuming that the jury might find the general authority of the agent in this department of defendant's business to be established by the testimony in the case, then, clearly, evidence of what he said and did in the premises, as such agent, was competent.

The former suit referred to in the answer seems to have been regularly dismissed, and is therefore no bar to this action.

Order affirmed.

FRANK REYNOLDS vs. MARY M. FLEMING and Husband.

June 20, 1890.

Vendor and Purchaser—Execution Sale of Purchaser's Interest.—

The interest of a vendee under a subsisting contract for the sale of land, under which he has entered and made improvements and paid part of the purchase-money, is subject to levy and sale upon execution.

Same—Certificate of Sale—Description of Interest Sold.—And where, in such case, the land is levied on and sold as his property, the sale is not void because his specific interest therein as vendee is not designated, but the certificate of sale will include the debtor's interest, and the purchaser will succeed to his rights under the contract.

Plaintiff brought this action in the district court for Douglas county, to compel a conveyance by defendants of certain described lands in that county, upon payment by plaintiff of the amount paid by defendant Mary on the contract for purchase mentioned in the opinion, and the amount of the taxes paid by her, with interest at the rate provided in the contract, the complaint alleging tender of such amounts and continued readiness to pay. The action was tried by Searle, J., who found the facts as stated in the opinion and ordered judgment for defendant Mary, who alone defended, from which judgment the plaintiff appeals.

Geo. L. Treat, for appellant.

H. Jenkins, for respondent.

VANDEBURGH, J. On the 15th day of June, 1876, Theresa Hicks, being then the owner of the village lot in controversy, bargained the same to Richard Fleming, and executed on that day a bond for a deed therefor, by the terms of which she obligated herself to convey the land to him upon being paid the purchase price named, \$75 cash, and the balance, \$50, in instalments, payable in one and two years. It is found that Fleming thereupon entered into possession of the premises under the bond, built a house and resided thereon with his wife, Mary Fleming, until the spring of 1883, when they

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both removed from the premises, and have not since occupied the same themselves; but the possession was by him turned over to her, and she has since had the sole beneficial use and possession thereof by her tenants, and has received the rents by his consent. Defendant Richard Fleming did not pay any instalments of the purchase-money after the first, and the obligee in the bond did not at any time take any action to enforce or declare the bond void. On the contrary, the evidence shows that the same was recognized as a subsisting obligation until after the recovery of the plaintiff's judgment mentioned in the findings. The court also finds that the defendants held possession under the bond. Having entered and made the improvements by the consent of the vendor, and in recognition of the contract, the continued occupancy thereunder, by the consent of Hicks, was an affirmance of the contract. And the title and interest of the vendee could not be forfeited or extinguished until after reasonable notice; and the evidence shows that the vendor so understood it. While it is found that he surrendered the possession to his wife, yet there was no transfer of his interest to her; it is evident that he put her in charge of the property, and allowed her to collect the rents. This did not divest his interest or possessory rights in the property, or prevent the lien of plaintiff's judgment from attaching, if it otherwise would have done so. Plaintiff's judgment against the defendant Richard Fleming was recovered on the 26th day of October, 1885, while the original bond was still in force, and the sale of the premises upon execution against him was made on the 11th day of December, 1886. An attachment had previously issued in the same action, which was levied on the premises as the property of Richard Fleming, September 14, 1885. Subsequent to this levy and the sale upon execution, the premises were conveyed to the defendant Mary Fleming, she having paid the balance of the consideration money and interest due to Hicks, and at the same time the defendant Richard delivered to the latter a release of his interest in the property.

Upon these facts two questions are presented: (1) Whether the interest of Richard Fleming was subject to levy and sale upon execution; and (2) whether the levy upon and sale of the lot upon execution, as made by the sheriff, passed such interest to the purchaser,

so as to place him in the shoes of Fleming, and to entitle him to complete the purchase and to demand a deed under the bond.

Whether the vendee's interest under a land contract may be sold upon execution depends upon statute regulation. In a majority of the states, the general rule is that where a vendee has paid up in full, and has therefore the entire beneficial interest, and a complete equity, the land may be sold upon execution against him; but otherwise where he has paid only a part of the purchase price, his interest being treated as a mixed or complicated equity. But no distinction is made in the statutes of this state in this respect between what are called legal and equitable interests in land. By Gen. St. 1878, c. 66, § 300, it is provided that all property, real and personal, belonging to the judgment debtor, may be levied on and sold on execution; and by chapter 4, § 1, subd. 8, land or real estate "shall include lands, tenements, and hereditaments, and all rights thereto and interests therein." This was held in *Wilder v. Haughey*, 21 Minn. 106, to include equitable as well as legal interests in land. And the same construction is put upon a corresponding statute in Wisconsin. *Van Camp v. Peerenboom*, 14 Wis. 65. And in several of the other states, under substantially similar statutory provisions, the equitable interest of a vendee under a subsisting contract, though the purchase price is only partly paid, is subject to the lien of a judgment against him, and to levy and sale upon execution, and the purchaser at the execution sale becomes substituted to and acquires all the right, title, interest, and claim which the debtor had. The interest is one which is transferable by deed, and the sheriff's deed carries with it all that the debtor's deed could. *Fish v. Fowlie*, 58 Cal. 373; *Harrison v. Kramer*, 3 Iowa, 543; *Crosby v. Elkader Lodge*, 16 Iowa, 399, 405; *McMechen v. Marman*, 8 Gill & J. 57; *McMullen v. Wenner*, 16 Serg. & R. 18; *Auwerter v. Mathoit*, 9 Serg. & R. 397. The defendant Fleming had, then, an interest in the property which was subject to the lien of the judgment, and to levy and sale upon execution. As, in the case of a vendor, the lien of a judgment against him will be lost when his interest ceases by virtue of the performance of the conditions of his contract for the sale of land when they are fulfilled by the vendee, so the judgment creditor of the vendee takes the risk of

the forfeiture of the vendee's interest through default or laches; and a suit in equity to reach the vendee's interest may frequently be the better remedy.

2. The sheriff attached the land as the property of the defendant Richard Fleming, and it was sold upon execution as such. The execution directed the sheriff to satisfy the judgment out of the real property of the debtor, if no personal property could be found, and the land in question was sold in pursuance of such direction, and the ordinary certificate of sale issued; and though no specific interest is designated, it will be intended to extend to and include the debtor's interest in the land described therein. The sale and conveyance of the whole lot would convey a moiety or undivided interest. And, while it would be the better practice to describe the debtor's interest accurately, it is not absolutely essential, in ordinary execution sales, that the sheriff should specify in his notice and certificate the precise *quantum* of the debtor's estate therein. Under the language of the statute, the certificate describing the land will carry with it "all the right, title, and interest of the person whose property is sold in and to the same at the date of the lien upon which the same was sold." Gen. St. 1878, c. 66, § 322. The mistake would ordinarily prejudice no one but the creditor or purchaser, and the sale would not be null and void or outside the authority of the writ. *Mechanics' Bank v. Williams*, 17 Pick. 438; *Baker v. Baker*, 125 Mass. 7; *Pettee v. Peppard*, Id. 66, and cases; *Jackson v. Scott*, 18 John. 94, 98. In *Smith v. Lytle*, 27 Minn. 184, (6 N. W. Rep. 625,) the sale was in pursuance of a judgment specially directing the interest to be sold in a proceeding to enforce a mechanic's lien, and the officer departed from the directions of the court in making the sale. Without assuming to re-examine the facts in that case, or the strict application of the rule followed therein, it is sufficient to say that it is not to be extended to ordinary execution sales, and is inapplicable to the facts of this case.

Judgment reversed.

NELLIE DALEY and Husband vs. MINNESOTA LOAN & INVESTMENT
COMPANY.

June 20, 1890.

Mortgage by Infant Wife and her Husband.—Under Gen. St. 1878, c. 40, § 2, where a married woman executes jointly with her husband a deed of her separate real estate, the validity of such deed is not affected by the fact of her minority; and the provisions of that chapter extend to mortgages.

Mortgage—Usury—Charge for Expenses.—A charge made in good faith, and which is found to be reasonable in amount, to cover expenses for examining title and the preparation of the writings necessary to secure a sum loaned to a mortgagor, *held* not usurious.

Same—Interest between Execution and Acceptance.—And where the business is transacted through the mails, and a reasonable time transpires between the date of the execution of the securities, which bear interest from their date, and their final acceptance and the delivery to the mortgagor of the sum loaned, and it is found by the trial court that there is no intention to pay or exact an unlawful rate of interest, *held*, that the securities are not void for usury because of such intervening lapse of time.

Action brought in the district court for Rock county, for the cancellation of a mortgage for \$800 of land of the plaintiff Nellie, executed by both plaintiffs to the defendant. Trial by *Perkins, J.*, and judgment ordered and entered for defendant, from which the plaintiffs appeal.

Daniel Rohrer, for appellants.

Geo. W. Wilson and *P. E. Brown*, for respondent.

VANDERBURGH, J. 1. The mortgage in question here was made by the plaintiffs, husband and wife, jointly, upon the real estate of the wife, she being at the time a minor. By Gen. St. 1878, c. 40, § 2, (Laws 1887, c. 47,) it is expressly provided that the validity of the deed should not in such cases be in any manner affected by the minority of the wife, and the purpose of the statute is very clearly expressed. A mortgage of real estate is a "deed," within the meaning

of that section and chapter. The effect in such case is to remove the disability of infancy. The amendment we have referred to was added to the section in question in 1869, and was doubtless deemed proper for the better security of titles, and in view of the protection of the wife already afforded by the statutory provisions requiring her husband in all cases to join in her deed.

2. The further ground on which the plaintiffs seek to avoid the mortgage is usury. Upon this branch of the case, however, the material facts are all found adversely to them, and there is no doubt of the sufficiency of the evidence to support the findings. During plaintiffs' negotiations for the loan secured by the mortgage, it was mutually agreed between the parties that the defendant should be allowed \$10 for services and expenses in connection with the loan, which included the preparation of the papers, examining abstract, and investigating the condition and value of the property, and the charge is found to be reasonable and *bona fide*. It further appears that, upon the acceptance of the plaintiffs' application for the loan, the note and mortgage were forwarded to them for execution, and the sum to be loaned was set apart for them awaiting the return of the securities after execution, and the examination and approval of the abstract, which was immediately examined on its receipt, and a draft for the amount of the loan sent to plaintiffs by return mail. The fact that the note was bearing interest from its date and during the interval, the transaction having been in the usual course of business and well understood between the parties, did not necessarily make it usurious; and the court finds there was no intent to pay or exact an unlawful rate of interest. Upon the findings in this case the charge of usury cannot be supported.

Judgment affirmed.

WILLIAM B. WILSON *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

June 20, 1890.

Railway—Fire Set by Engine—Evidence—Statutory Presumption.—

Evidence considered, and *held* sufficient to warrant the court in submitting to the jury the question whether the fire which destroyed plaintiff's buildings was set by sparks from defendant's locomotive engine. And *held, also*, that the statutory presumption of defendant's negligence was not so clearly and conclusively rebutted by the evidence in the case as to justify this court in reversing the decision of the trial court.

Appeal by defendant from an order of the district court for Anoka county, *Smith, J.*, presiding, refusing a new trial after verdict of \$471 for plaintiff.

Jno. C. Bullitt, Jr., and *Tilden R. Selmes*, for appellant.

Everett Hammons, for respondent.

VANDEBURGH, J. 1. There was evidence for the jury to consider upon the first branch of the case, tending to show that the fire which caused the damage complained of was set by defendant's engine. It shows that the fire caught in the dry grass about 60 feet south or southwest of the defendant's track, in the direction of plaintiff's premises, and was observed soon after the train passed. There was a very high wind blowing at the time, and the fire spread very rapidly to plaintiff's stacks and buildings, some of which were destroyed. The fire when discovered is represented by one of the witnesses to have been a small blaze only. Another witness testified that the engine scattered fire from its ash-pan. A train had passed on the Manitoba road, adjoining the track of the plaintiff, from 20 to 30 minutes previous to the passage of the defendant's train. It was a question for the jury to determine as to the probability of the fire having been caused by the defendant's engine.

2. Nor was the evidence offered by the defendant to rebut the statutory presumption of negligence so full, specific, and complete in all respects as to authorize this court to hold that it was conclusively shown that the engine was in suitable repair, and managed with due care and skill. The train was running at the rate of 35 miles an

hour, the wind was strong, the ground was very dry, and the danger of setting fires very great at that season. Neither the engineer nor fireman had any knowledge of the fire, and they have no particular recollection of the circumstances of that trip. They are only able to testify, generally, in respect to the condition and management of the engine. One of plaintiff's witnesses swears he saw that the engine scattered fire as it passed along, or fire dropping from the engine "from underneath," which defendant's witnesses claim was hardly possible if the back damper was kept closed, which was necessary for safety. We are not able to say that it clearly appears, in view of the circumstances, that the care used was commensurate with the danger reasonably to be apprehended, or that the verdict is wholly without support. *Nichols v. Chicago, St. Paul, M. & O. Ry. Co.*, 36 Minn. 452, (32 N. W. Rep. 176;) *Grand Trunk R. Co. v. Richardson*, 91 U. S. 454, 469.

Order affirmed.

JOHN B. SCHWAB *vs.* MICHAEL PIERRO, Executor.

June 20, 1890.

Recovery for Services Rendered in Contemplation of Devise—Evidence.—S. worked for P., who was his uncle, without any express agreement for compensation, but with the mutual understanding of both that he should be compensated by adequate provisions in the will of M. The latter died without making such provision. *Held*, that S. might recover the value of such services as upon a *quantum meruit*.

The plaintiff having appealed to the district court for Hennepin county from the disallowance, by the probate court, of a claim presented by him against the estate of defendant's testator, the action was tried before *Young, J.*, who directed a verdict of \$1,250, with interest at 7 per cent. from August 1, 1884, for plaintiff. The defendant appeals from an order refusing a new trial.

Penney & Rogers, for appellant.

Geo. C. Ripley, C. E. Brennan, and S. A. Booth, for respondent.

43	520
57	285
43	520
179	283

VANDEBURGH, J. The plaintiff seeks to enforce a claim against the estate of Michael Pierro for services rendered him in his lifetime. The defence relied on is that the plaintiff was a nephew of the deceased, and was a member of his family while such services were rendered, and that they were so rendered without any promise or agreement, express or implied, on the part of the deceased, to pay for the same, and without any expectation on plaintiff's part to receive any compensation therefor. The deceased was a bachelor, and owned a hotel in Minneapolis. His only relations were plaintiff's mother, who was his sister, the plaintiff, and the defendant, executor and principal legatee, who was his cousin. About 1877, plaintiff, then a boy about 13 or 14 years of age, came with his mother, a widow, to plaintiff's house, which was then rented and managed by one Brandenburg as a hotel and saloon, and she went to work there for wages, and he "did chores for Brandenburg," and the deceased boarded at the same place. This state of things continued for several years till the spring of 1882, when the plaintiff, then about 18 years of age, left, and went to work for wages at Chaska. In May of the same year Brandenburg surrendered possession of the hotel to the deceased, who thereupon became proprietor, and plaintiff was notified by his mother, who remained there, to return, because he was needed to take charge of the business for his uncle. He thereupon came back, and for two years and upwards took charge of the hotel and saloon, bought the supplies, paid the bills, tended bar, and had the general care and management of the business. The deceased, however, was about the premises, and received the avails and profits of the business. At the expiration of two years and three months the plaintiff succeeded to the business, having bought the same of his uncle, but not the hotel property. In the mean time both plaintiff and his mother had continued to work for and assist the deceased in carrying on the hotel business. After that he paid rent to the deceased for the use of the hotel. What compensation his mother received during this time does not appear. It is clear enough from the evidence that the plaintiff did not understand that he was to receive no compensation for his services other than as a member of the family of the deceased, or that his board and living

expenses were adequate compensation, for it is admitted that his services were reasonably worth \$50 per month. Prior to the time he left for Chaska, he was living with his mother at Brandenburg's hotel, and, though the deceased boarded there, the presumption is that he was supported by his mother; and, though there is evidence tending to show that both before and after his return from Chaska his uncle had made some expenditures for him for necessities, there is hardly enough to show that he had assumed the responsibility of plaintiff's support, or that in consideration thereof the latter was rendering the services in question. He had never claimed plaintiff's wages before, and when the latter was sent for to take charge of the hotel it could hardly be presumed that either party expected or understood that he was not to receive adequate compensation of some sort. And, though there was no express agreement or definite understanding between them, it is rendered indisputably clear from the evidence what the apparent intention and purpose of the deceased was, as expressed in the presence of the plaintiff and to his friends, from time to time, and what was plaintiff's expectation and understanding in the premises,—and that was that he was eventually to have the hotel property as the devisee of his uncle. There is hardly room for a difference of opinion that such was the mutual understanding of the parties when the services were rendered. And the repeated declarations of the deceased, his general course of conduct towards the plaintiff, and the situation and relations of the parties, were sufficient to justify the trust and confidence reposed by the plaintiff in the assurances of the deceased that he was to be his sole heir; and this fact affords a sufficient explanation of his conduct in not presenting any claim for his services, or demanding an accounting and settlement with his uncle before he died, for no claim for compensation was to be made in his lifetime.

The plaintiff could not, under the statute, give testimony in reference to what may have passed directly between him and the deceased on the subject; but, while there was no express agreement proved, there was ample evidence of the mutual understanding of the parties in reference to the intentions of the deceased, and the character of

the compensation which the plaintiff was induced to believe he would finally receive. The plaintiff was entitled to be paid for his services unless they were to be performed gratuitously; but the evidence, we think, satisfactorily shows the nature of the compensation contemplated by the parties, and rebuts any presumption which might arise from the relations of the parties that they were not to be rewarded. It is not enough that the services should be rendered merely in the hope or expectation of a legacy, and relying solely on the generosity of the testator. But the rule appears to be well established that where it is mutually understood that services are not to be rendered gratuitously, but to be compensated for in a particular way, then the law will permit a recovery of the reasonable value of such services, if the particular compensation contemplated is not made. *Martin v. Wright*, 13 Wend. 460; *McRae v. McRae*, 3 Bradf. Sur. 199, 204; *Patterson v. Patterson*, 13 John. 379; *Quackenbush v. Ehle*, 5 Barb. 469; *Robinson v. Raynor*, 28 N. Y. 494.

It was error to allow evidence to be introduced of the value of the estate, as this might improperly influence the estimate of the damages. *Erben v. Lorillard*, 19 N. Y. 299. But it was without prejudice in this case, for the reason that the value of plaintiff's services was admitted.

The case rests solely upon the evidence introduced by the plaintiff. The defendant contends that it ought to have been submitted to the jury for them to pass upon, and that the court erred in directing a verdict. But the plaintiff seems to have made a strong case. It is supported by the testimony of numerous witnesses showing the intention of the testator, as repeatedly expressed by him, and the mutual understanding of the parties, that the plaintiff was to have the property. There was no conflict, and there can hardly be said to be any reasonable doubt, as to the inferences to be drawn from the testimony, by which we think the facts as above stated are satisfactorily proved. *Robinson v. Raynor*, 28 N. Y. 494, 499.

Order affirmed.

STATE OF MINNESOTA, *ex rel.* Chicago, Milwaukee & St. Paul Railway Company, *vs.* W. S. SHARDLOW and others.

June 23, 1890.

Highway—Appeal from Justice—Waiver of Defect in Bond.—Upon an appeal to a justice of the peace under Gen. St. 1878, c. 13, § 60, in proceedings for laying out a highway by supervisors of a town, the supervisors, by consenting to a continuance before making any objection to the bond filed pursuant to that section, waive any defects in it.

Highway Laid across Railway—Compensation—Benefits.—In assessing damages to a railroad company for laying out a highway across its track, benefits by increase in its traffic or business, arising from the increased facility for travel which the highway affords, are not to be taken into account.

Same—What Damages Allowable.—*State v. District Court*, 42 Minn. 247, followed as to what damages may be allowed a railroad company for laying out a highway across its track.

Same—Railway Company to Construct Crossings—Act Held Valid.—Laws 1887, c. 15, and Laws 1889, c. 222, requiring railroad companies to construct crossings wherever highways intersect their tracks, are not, as to highways laid out after their passage, unconstitutional because they make no provision for compensation; for such provision is made by the statute regulating the laying-out of highways.

Certiorari.

Lyndon A. Smith and *C. A. Fosnes*, for relator.

J. O. Haugland, for respondents.

GILFILLAN, C. J. The supervisors of the town of Kragero, in the county of Chippewa, laid out a highway which crosses the relator's right of way and track; and they determined and awarded that the advantages and benefits accruing to the relator from said crossing were equal to the damages sustained, and so they allowed the relator nothing. The relator appealed, in relation to the damages, to a justice of the peace, who, pursuant to the statute, summoned a jury and the supervisors; and the matter was retried before the jury, and their verdict affirmed the award of the supervisors. The relator has brought the matter here upon a writ of *certiorari*.

The respondents, the town supervisors, claim that the justice had no jurisdiction, because of defects in the bond filed by relator as required by Gen. St. 1878, c. 13, § 60. The filing of the bond thereby required is a condition precedent to the justice's authority to issue the summons; but the summons is only for the purpose of notice to bring the supervisors, who represent the town, before the justice. Any defect in it, or in what is required to be done prior to issuing it, goes only to the jurisdiction over the person, not to the jurisdiction over the subject-matter, the proceeding not being one *in rem* when the only question involved in the appeal is the amount of damages to be paid by the town to the party appealing. In such case the proceeding is analogous to a civil action. The determination has the effect of a judgment. The section referred to calls it an "action." All such proceedings, where the amount of damages claimed does not exceed \$100, are within the general jurisdiction of a justice. Any defect in the issuing or service of the summons may therefore be waived by the party summoned to appear, as in civil actions, and anything that he does or consents to which assumes that he is properly before the court for the purpose of the action will be a waiver. In this case the parties stipulated for a continuance of the action, the respondents not reserving the right to object to the jurisdiction on the day to which it was continued, and thereby waived the objection.

On the trial, in order to show special benefits to be offset against the damages claimed, respondents asked one witness what were the advantages to the relator by the road being laid out. The answer was that, "if that crossing waen't made, the farmers would have to go to Appleton instead of going to Milan, and by going there they are just as liable to sell their wheat on the Manitoba as on the Milwaukee road." To a similar question another of respondents' witnesses said: "They will get more wood to draw west, and more wheat to draw east, and the company will have the advantage of the freight." A motion seasonably made by relator to strike out these answers, as showing only general and not special advantages, was refused. This was error. In taking private property for public use, only such advantages and benefits as are direct and special to the land a part

of which is taken, and not such as come from the claimant's sharing in the common convenience of increased public facilities, are to be considered. *Arbrush v. Town of Oakdale*, 28 Minn. 61, (9 N. W. Rep. 30.) If relator has a station at Milan, and the road makes it easier for people living on or near it to get there, the benefits to relator are such, in kind, as it will share with those people, and with those who live in and do business at that place. They are the common benefits accruing from increased facilities for public travel. It would be difficult to see how a railroad company can derive a special benefit from a country road crossing its track.

The items of damage that relator claimed it was entitled to were for the cost of two cattle-guards, four cattle-guard wings, one crossing sign, ten crossing planks, and grading. As to the cattle-guards and wings and crossing sign, it was held in *State v. District Court for Hennepin Co.*, 42 Minn. 247, (44 N. W. Rep. 7,) that imposing the duty of constructing and maintaining them at highway crossings on a railroad company is a legitimate exercise of the police power of the state in providing for the safety of the public, and that the company is not entitled to compensation for performing the duty so imposed, and therefore those items are not to be taken into account in estimating damages for laying a highway across the track. The same decision puts the matter of planking the crossing—and the grading would be of the same character, and for the same purpose—upon a different footing, and holds their cost to be legitimate items of compensation.

The relator argues that the acts of 1887 (c. 15) and 1889, (c. 222,) requiring railroad companies to construct crossings wherever highways intersect their tracks, are unconstitutional because they make no provision for compensation. But a legislative act providing for taking property for public use is not unconstitutional merely because it does not itself provide for compensation to be made, if there be another statute under which it must be made or secured before the property can be taken, and which does secure it as a condition of the taking. However it may be as to highways laid out across railroads prior to the passage of the acts referred to, highways to be subsequently laid out come within this proposition; for the statute

authorizing and regulating the laying-out of highways contains ample provision for securing compensation for all damages to property by reason of laying them out; and under this statute, if the cost of performing the duty imposed to plank and grade, be, as held in the case last referred to, a legitimate item of damages by reason of laying out the highway, its payment is provided for. The objection to the acts of 1887 and 1889 is of no force as applied to highways laid out after those acts went into effect. In this case the items for planking and grading were proper items for damage, and ought to have been allowed.

The verdict of the jury is set aside, and the case will be remanded to Elias Jacobson, justice of the peace, successor in office to the said justice, to be tried before a new jury.

43	597
46	444
43	527
82	184

CHICAGO, BURLINGTON & NORTHERN RAILROAD COMPANY *vs.* L. C.
PORTER, impleaded, etc.

June 22, 1890.

Railway—Switch in Street—City Ordinance.—An ordinance of the city of Winona, *held* to be sufficient consent on the part of the common council to the laying of a certain railroad switch track in that city.

Same—Eminent Domain—"Public Use" Defined.—Whether the use for which lands for the construction of a railroad track are to be taken is a public or private use does not depend on the number of persons who may have occasion to use it. If all people have a right to its use, it is a public use, though the number who require the use may be small.

Same—Company must Prove Incorporation.—Upon the hearing under Gen. St. 1878, c. 34, § 7, as amended by Laws 1879, c. 35, § 1, of a petition for the appointment of commissioners to determine the compensation for taking lands for railroad purposes, it is for the petitioner to prove its incorporation.

Appeal by defendant L. C. Porter from an order of the district court for Winona county, *Start, J.*, presiding, granting a petition for the appointment of commissioners in a condemnation proceeding.

Wilson & Bowers, for appellant.

Gale & Brown, for respondent.

GILFILLAN, C. J. This is an appeal from an order made on the application of the plaintiff, appointing commissioners to appraise the damages to be paid by it for taking private property for public use, for the purpose of constructing a switch track in the city of Winona, from its main track, along a line described in its petition, to the manufacturing establishments of the Laird-Norton Company. The proposed switch line runs partly upon a public alley and partly upon private property, and crosses at least one public street. The defendants, owners of land proposed to be taken, appeared before the district court to which the application was made, and opposed it, and, after a hearing, the court granted the application, and defendants appeal. The assignments of error make three points, all of which we will consider, though not in the order in which they are stated in the assignments: *First*. The city of Winona did not authorize the petitioner to construct, operate, or maintain such line. *Second*. The proposed condemnation is not for a public use, but for a private use, and no public necessity is shown for it. *Third*. The evidence does not show that the petitioner is a corporation, or that it is authorized by law to construct, maintain, or operate any railroad in this state.

The charter of the city of Winona (Sp. Laws 1867, c. 20) gives the common council (section 2, *subc.* 4) authority, by ordinances, resolutions, or by-laws, among other things, "to direct and control the location of railroad tracks." Subdivision 24. August 2, 1886, the common council passed an ordinance granting to the Chicago, Burlington & Northern Railroad Company authority to construct its main line through the city, and upon and across certain streets, describing the line, "and also, from time to time, to construct, operate, and maintain, from its main track to commercial and manufacturing establishments and yards northward from said main track, situate within seven hundred feet of its main line, such side tracks and switch tracks as such commercial and industrial interests may require." Section 3 of the ordinance prescribes regulations as to width of tracks, and how to be laid with reference to the grade or surface, when laid in a street or alley, and as to the crossings at streets or

alleys. The switch track here in question comes within the limits of that part of the ordinance quoted, and, so far as the right to lay it on the line proposed depended upon the consent of the council, the plaintiff had the right. But the ordinance could not have the effect of giving authority to construct a railroad or any part of a railroad, and for that purpose to take private property. That authority must be derived from the legislature. The power conferred by the charter on the council, "to direct and control the location of railroad tracks," does not include the power to authorize the constructing of railroads, and the exercise of the right of eminent domain. It merely vests in the council as part of its police power, to be exercised in providing for the public safety and convenience in the use of streets and alleys, a supervision over the location of railroad tracks, where the authority to construct the railroad already exists, including the power to designate what streets and alleys may be laid upon. If the plaintiff had legislative authority to construct, maintain, and operate a railroad with side and switch tracks, and to take private property for the purpose, it need look to the council for nothing more than consent to its locating its tracks upon particular streets and alleys, which, as we have seen, was granted.

The assignment of error that the condemnation is sought for a private, and not a public, use, is based on the fact that the switch track is to terminate at the Laird-Norton manufacturing establishments, and on defendant's claim that it is intended for the sole accommodation of the business of those establishments. Though it seems from the evidence that, at present at least, those establishments may be benefited by the switch track more than any one else of the public, because they have more freights to ship upon it, the claim that it is intended for their sole accommodation is hardly sustained by the evidence. At any rate, so far as the question of public or private use depends on facts to be found from the evidence, the court below found them against the defendants, and that finding, as also the findings, included in the order made, that the public interests require the construction of the switch track, and that the lands proposed to be taken are required and necessary for the purpose, are conclusive, if fairly

sustained by the evidence. The switch track, as the evidence shows, is to be part of a system of tracks, all belonging to the general enterprise of maintaining and operating a railroad for public use. The character of the use, in the case of a railroad or railroad track, does not depend on the amount of business, or the number of persons who may have occasion to use it, but on the right of the public to the benefit of it. If all the people have a right to the use of it, it is a public use or interest, though the number who require its use may be small. *Kettle River R. Co. v. Eastern Ry. Co.*, 41 Minn. 461, (43 N. W. Rep. 469.) There is nothing in the evidence to indicate that the Laird-Norton Company is to have any control over or management of the track in question, or to have any right in it other than that of any person or corporation having business establishments along or near it, to wit, the right to ship and receive freight upon it carried or to be carried over plaintiff's lines. It does not appear that there is to be anything exclusive in its contemplated use. The assignment of error is not well founded.

As to the third assignment of error, as herein numbered. It is elementary that no one but the state can exercise the right of eminent domain, without showing a grant from the state of authority to exercise it. The statute has not granted authority to exercise it for railroad purposes, except to corporations created or organized for the purpose of constructing and operating railroads. Where an attempt is made to take private property for a railroad, due incorporation as a railroad company of the party seeking to take it must appear, either by proof or by presumption. The mode of taking is prescribed by Gen. St. 1878, c. 34, commencing with section 18. The hearing upon the application is regulated by section 17, as finally amended by Laws 1879, c. 35, § 1. No pleading, unless the petition may be regarded as one, is required. The rule in Gen. St. 1878, c. 66, § 112, prescribing how a defendant shall put in issue the fact of plaintiff's incorporation, relates only to civil actions, and has no application to proceedings under section 17, c. 34. Undoubtedly, any one opposing the proceeding may state his objections in writing, and, should he do so, would probably be limited to the objections thus stated, and

be held to concede anything not embraced in the objections. In this case the written objections seem to cover everything necessary to appear in order to justify the taking.

The question is, upon whom was the *onus* of proof upon the fact of incorporation? Was it for the petitioner to prove that it was incorporated, or for those opposing the application to prove the contrary? We see nothing in the terms of the section to indicate an intention that the petitioner shall come before the court with any presumption in favor of its right to the relief it seeks, either in respect to the fact of its incorporation, or as to the existence of any other condition necessary to appear before the relief can be granted. Nor is there anything showing an intention to change the natural order of proofs as it exists almost universally in judicial proceedings. That order requires that one standing in the position of asserting and relying on the existence of a fact must prove the fact. In cases like this, there are strong reasons for adhering to, rather than departing from, that rule. The evidence as to the fact of incorporation, if there be any, is more peculiarly within the power of the petitioner than of those opposing the petition. Cases from New York are cited holding that, under the statute of that state, somewhat similar to section 17, the *onus* of proof as to the fact of incorporation is on the party opposing the application. There is, however, enough difference in the language of the two statutes to deprive those decisions of any weight as authority upon the interpretation of our statute. From the memorandum filed by the court below, we infer that its attention was not particularly called to the absence of evidence of the fact of incorporation. Because there was no such evidence, the order must be reversed, and a rehearing had on the issue of the corporate character of the petitioner as a railroad company, and if, upon such rehearing, the court below find such issue in favor of the petitioner, the order appointing commissioners to stand, otherwise to go for naught; the court below not being required to retry the other issues, but the order appealed from to stand unreversed so far as concerns the court's findings on those issues.

JOHN SNOWBERG vs. NELSON-SPENCER PAPER COMPANY.

June 23, 1890.

Master and Servant—Defective Machinery — Promise to Remedy.—

Complaint *held* not to show assumption of risk, nor contributory negligence, on the part of a servant injured in the use of dangerously defective machinery.

Action brought in the district court for Otter Tail county, to recover \$15,200 damages for personal injuries, the case made by the complaint being as follows: On December 1, 1888, the plaintiff was in defendant's service, his duty being to operate a machine (fully described) known as a straw-cutter. On that day the defendant negligently built a shed against the mill, darkening the room where the cutter was situated, and at times the darkness was intensified by the escape of steam from a defective attachment in a rotary bleacher in the same room. On January 12, 1889, and for several weeks before, the surface of the feed rolls of the cutter had become worn, dulled, and clogged so as not to work as effectively as they should, and the pinion by which they were revolved had become worn, and would at times slip and remain stationary on its bearing, and not turn the rolls, or would turn them irregularly with sudden stops and starts; and the cogs on the pinion had become worn so as at times to slip by those of the feed rolls; and two of the knives on the cutting cylinder had been broken and removed, thereby throwing it out of balance and greatly impairing its efficiency; and part of the top of the curbing or feed box in front of the rolls had been removed by defendant. On January 12, 1889, the chaff, which was intended to and did pass through an opening in the bottom of the feed box, had completely filled the space between such opening and the mill floor, so that the lower feed roll could not adjust itself upon its springs to receive the straw for the cutter, and plaintiff proposed to defendant to remove the accumulation, but was sent to work in another part of the mill, where he was employed until about three o'clock, and was then directed to begin cutting straw with the cutter. When he entered the

room to resume work at the cutter, the room was filled with steam and darkened, and, in consequence of the accumulation of chaff and the above-mentioned defects in the machinery, the straw would not pass through the feed rolls, so that plaintiff was obliged to and did attempt to force the straw through the rolls by pressing with his hands, and, while doing so, the resistance was suddenly removed, and his left hand was caught in the rolls and drawn through until the arm was cut off. Plaintiff had notified the defendant (at what time is not stated) of all the above-mentioned defects, and the defendant had promised him that at the earliest possible time the mill should be so arranged that there would be no further need of the cutter, and had specially requested him to continue operating it until such change could be made, which would be in a very short time; and on the morning of the day of the accident the defendant informed him that it would not be necessary to clear away the accumulations under the machine or to repair it, as it would not be used after that day. Plaintiff remained in defendant's service wholly on account of and relying on defendant's promise and in daily expectation of being relieved from operating the cutter.

A general demurrer to the complaint was overruled by *Baxter, J.*, and the defendant appealed.

Hale & Peck and *Parsons & Brown*, for appellant.

T. Z. Root and *Clapp & Houpt*, for respondent.

GILFILLAN, C. J. The allegations of this complaint are not so precise and definite as might be desired as to some of the facts, but the pleading will suffice as against a demurrer. There can be no doubt that the defects in the machinery which rendered it dangerous for plaintiff to work with it, and also the danger he was in by reason of such defects, were known to plaintiff, so that he would be taken to have assumed the risk, were it not for the alleged promise of the defendant to remedy the defects, and its request to plaintiff to continue using the machinery until it should remedy them, bringing the case within the recognized exception to the general rule that a servant who uses defective machinery, knowing of the defects and the consequent dangers, does so at his own risk. Of course, one who is within the exception may be so negligent in the use of the machinery

that any injury to himself will be chargeable in a greater or less degree to his own negligence, in which case he cannot recover. The manner of the injury to plaintiff, as stated in the complaint, is suggestive of this. It alleges, however, that it was necessary for him to do as he did, and in the face of that allegation it cannot be said that contributory negligence appears so that the case ought to be withheld from a jury.

Order affirmed.

C. C. JOSLYN, Receiver, *vs.* ATHENS COACH & CAR COMPANY and others.

June 23, 1890.

Receiver — Discharge—Compensation.—A receiver cannot be retained merely to enable him to get assets into his hands from which to pay his compensation and charges.

Same—Discharged without Compensation.—Where a receiver has no assets in his hands, it is not error to discharge him upon the application of those at whose instance he was appointed, without making payment of his compensation and charges a condition precedent to the discharge.

Same—Subsequent Order as to Compensation.—Upon an application by parties interested for such discharge, and one by the receiver for adjustment of his compensation and allowance of his accounts, both heard together, the court may grant the discharge, and determine the matter of the compensation and accounts in a subsequent order.

Appeal by the above-named receiver from an order of the district court for Hennepin county, *Rea*, J., presiding, which is stated in the opinion.

C. E. Conant and C. C. Joslyn, for appellant.

Flannery & Cooke, for respondents.

GILFILLAN, C. J. Upon the petition of certain creditors, Joslyn was appointed receiver of the People's Coach Line, as of an insolvent corporation debtor. The only assets that came into the hands of the receiver amounted, after he converted the chattels into

money, to about \$37. There was other personal property of the corporation, amounting in value to about \$4,000, upon which the corporation had given a chattel mortgage, and which the mortgagee had taken in an action in replevin, brought, we infer, against the corporation. In this action the receiver intervened, claiming the mortgage to be void as to him. But he did not get possession of the property. Afterwards all the creditors of the corporation applied to the court by petition to have the order appointing the receiver vacated; in other words, to have the proceedings in insolvency discharged. At the same time the receiver applied by petition. His petition states the above facts in respect to the property of the corporation; recites that one of the creditors has offered to pay all fees and charges of the receiver and his attorney, and indemnify all parties against other claims that may hereafter appear against the insolvent corporation, on the sole condition that the court discharge the receiver, the court to allow such fees as seem to it reasonable. The only part of the receiver's petition which indicates relief sought by him is as follows: "That, if such adjustment seems meet to this court, your petitioner is willing to leave the adjustment of his fees and those of his attorney to this court, and prays that his accounts to date may be allowed; and that thereupon the bond heretofore entered into on the 16th day of November, A. D. 1889, by your petitioner, as receiver in said cause, together with C. R. Waterman and J. H. Coolidge, as sureties thereon, may be vacated, and your petitioner finally discharged as such receiver." The two petitions were heard together. The court made two orders,—one, December 4th, discharging the receiver, "without prejudice to the right of said receiver to have an allowance of his fees and expenses as such receiver to date, but the court refuses in this proceeding to order said petitioners to pay said receiver's fees and expenses, either absolutely or as a condition to said receiver's discharge;" and the other, December 10th, which allowed the receiver's accounts, and fixed and allowed his fees and charges, and those of his attorney, and vacated his bond. From the order of December 4th the receiver appeals.

No objection can be made to that order unless the court was bound, upon the petitions before it, to make the payment of the re-

ceiver's charges a condition precedent to his discharge; in other words, unless it was bound to retain the receiver until payment of those charges, and to secure their payment. As a general rule, where a receiver has been regularly appointed, his compensation is a charge upon the funds in his hands. But in this case all the funds that came to his hands were appropriated without satisfying his claim for compensation. So that it is a case where the receiver has no assets in his hands applicable to payment of his charges; for, until and unless he should recover the property or its value involved in the replevin action, that property could not be deemed such. Of course, the receiver could not be retained merely to enable him to reduce such assets to possession for the purpose of paying his charges. That would be continuing the receivership for the benefit of the receiver,—a thing never heard of. It may be that, on an application of the party whose property has been sequestered (regularly) to be relieved from the receivership, the court may decline to discharge the receiver, except on condition of payment of his charges, until such time as will give him an opportunity to apply the funds or assets in his hands to such payment. That, however, is not this case. The court was not required to make the discharge dependent on the previous payment of the charges, and the order is not erroneous for not doing so. So far as requiring the petitioning creditors to pay such charges, that was a matter which the court might reserve, to be determined after determining the question of the discharge. It might, under the reservation in the order of December 4th, make a direction, if the case were proper for it, by a subsequent order, that the petitioning creditors pay the receiver. The order appealed from is not erroneous for not containing that direction. Had the appeal been from the order of December 10th, the question of the receiver's right, on his petition, to such a direction, would have been presented. But it is not presented by this appeal, because the court was not bound to pass on that right by the order discharging the receiver. Though the petitions were presented and the applications heard at the same time, the court seems to have treated and decided them as separate applications; hence the two orders, which, under the circumstances, might have been united in one. Had they been

so united, the receiver could not have complained, for there would have been granted him all the relief that his petition asks; for it does not ask that payment of his charges be made a condition of the discharge of the receiver, nor that any one be required to pay them, but only that his fees be adjusted, his accounts allowed, his bond vacated, and he finally discharged,—just the relief granted by the two orders.

Order affirmed.

CHARLES A. WILLIAMS *vs.* JOURNAL PRINTING COMPANY.

June 23, 1890.

Contract by Agent for and with Principal.—The rule that an agent or trustee cannot bind his principal or *cestui que trust* by a contract which he makes on behalf of the principal or *cestui que trust* with himself, applied.

Action to recover \$1,385, brought in the district court for Hennepin county, and tried before *Young, J.*, who ordered a dismissal at the close of the evidence for plaintiff. A new trial was refused, and plaintiff appealed.

Joseph W. Molyneaux, for appellant.

Kitchel, Cohen & Shaw, for respondent.

GILFILLAN, C. J. This action is upon a written contract for services, originally executed between plaintiff and one Blethen. By its terms, if Blethen should start a morning paper, to be done, if at all, within three months after May 15, 1888, and Blethen to determine whether he would do so on or before June 1, 1888, plaintiff was to serve as managing editor of such paper at a specified salary, and he was to receive a certain sum for waiting till that date for Blethen to decide; plaintiff to be always subject to his orders to perform any duties which he might request in favor of the Evening Journal of Minneapolis. In case Blethen should not start a morning paper, then plaintiff was to be editor of the Evening Journal, at a specified salary, no time being stated for the continuance of that service.

About June 15, 1888, plaintiff called Blethen's attention to the fact that the writing stated no term for the service, and thereupon the latter indorsed on it: "This contract is hereby accepted to run one year, unless sooner determined by mutual agreement. [Signed] JOURNAL PRINTING COMPANY. By A. J. BLETHEN." Blethen was, at the time of making the original agreement and the indorsement, the general manager of the defendant. The plaintiff claims that the original agreement was the contract of defendant, and, if not, it became such by the indorsement. But the agreement on its face was the personal contract of Blethen. There is nothing in it to suggest that it was made on behalf of any one else. The defendant is in no way mentioned; and parol evidence could not be resorted to in order to show that the party named in it was not the party bound by it, but that some one not named was. *Rowell v. Oleson*, 32 Minn. 288, (20 N. W. Rep. 227.) The only way in which the indorsement can operate to make the agreement that of the defendant is to make it substitute the defendant in the place of Blethen as a party. This is the effect claimed for it. To bring about this substitution required a contract consented to by all the parties,—the plaintiff, Blethen, and the defendant. It is at least doubtful, under the evidence, that plaintiff consented to it. But it is certain that no one on behalf of the defendant, except Blethen, gave its consent; and he could not, by virtue of his authority as its agent,—its general manager,—bind it by giving its consent. As to that, the case comes within the rule that an agent or trustee cannot bind his principal or *cestui que trust* by a contract made by him on behalf of his principal or *cestui que trust* with himself. He cannot put his interest as an individual in opposition to his duty as agent or trustee. Blethen's authority as general manager was necessarily limited by this rule of law. The agreement evidenced by the indorsement, to have the effect that plaintiff claims for it, must operate to relieve Blethen from the obligations of the original contract by shifting them over to the defendant. Blethen could not give its consent to be substituted to those obligations in his stead.

Order affirmed.

PETER SIMMONSEN vs. WILLIAM P. CURTIS and another.

June 23, 1890.

Replevin for Deed—Jurisdiction of Municipal Court.—An action in replevin for the possession of a deed conveying real estate, brought by the grantee, where the fact of the deed having been delivered by the grantor is in controversy, involves the title to real estate, and cannot be tried by the municipal court of St. Paul.

Same—Where Delivery is Disputed.—An action of replevin will lie, in a court of competent jurisdiction, to recover such a deed, although the fact of its delivery be in controversy.

Appeal by defendants from an order of the municipal court of St. Paul, refusing a new trial.

F. C. Stevens, for appellants.

Willis & Nelson, for respondent.

GILFILLAN, C. J. This is an action commenced, tried, and determined in the municipal court of St. Paul, in replevin, to recover possession of a deed conveying real estate, brought by the grantee named in it against the defendants, who claim to have held it as agents of the grantor. They claiming to hold it not in their own right, but in the right of their principal, the action is not materially different from what it would have been had it been brought against the grantor himself. The municipal court has no jurisdiction to try actions in which the title to real estate is involved, but whenever it appears in an action that such title is involved it must certify the case to the district court. The pleadings in the action did not show that title to real estate was involved. But at the close of the evidence the defendants, claiming that it showed title to be involved, asked to have the case certified to the district court, which was refused, and the court rendered judgment for plaintiff. If the question of title was involved, the court, when the evidence closed, certainly upon the request to certify the action, lost jurisdiction. On examining the evidence, we find that the only question of fact litigated was whether the deed had been delivered by the grantor to the grantee, or for

him to his agent,—the plaintiff's evidence tending to show that it was so delivered to plaintiff's agent, Johnson, and that by him it was deposited with defendants as collateral security; that on the part of defendants, that they did not receive it from Johnson, but that it was delivered to them by the grantor, to be by them delivered to the grantee's agent on the performance of a specified condition within a specified time, and, if such condition should not be so performed, to return it to the grantor. In other words, according to the plaintiff's evidence, the deed was delivered, and the title to the land, (so far as the grantor had it,) and the ownership of and right to the possession of the deed, vested in the plaintiff. According to defendants' evidence, the deed was not delivered, the title did not pass, and plaintiff has no right to the deed, for plaintiff could be entitled to the deed only as the holder of the title passed by it. A decision of the issue determines conclusively, as between the parties to the action, that the execution of the deed was or was not consummated by delivery, so that it became or did not become operative as a conveyance of real estate. And it would be the same were the action by this plaintiff against the grantor. Had the action been against the grantor, a judgment in favor of the grantee, awarding him the possession of the deed, would have established in him the title to the land, so far as it depended on the execution of the deed. The defendant in such action could never afterwards have denied the fact of the conveyance. Any action the decision of the issues in which may lead to such a result necessarily involves title to real estate. The decision of the court affects the title. Often the fact of delivery is the only one involved in a contest of title. There might be an action to recover possession of a deed of conveyance that would not involve title to real estate. That would be so where there is no controversy as to the execution of the deed, and where the court is not called on to determine whether it was executed. As soon as it became clear that the fact of the delivery of the deed was in controversy, the court ought to have certified the case to the district court.

The objection has been made that an action of replevin will not lie for the possession of a deed conveying real estate, if the decision will involve the title to the land. We do not see why it may not lie, in a

court of competent jurisdiction, where the only fact to be determined, affecting the title, is that of the delivery of the deed.

Order reversed.

ESTELLE W. WILCOX vs. LEOMINSTER NATIONAL BANK.

June 23, 1890.

Docketed Judgment—Priority over Equity to Reform Deed.—A docketed judgment takes precedence not only of an unrecorded deed by the judgment debtor in whom the title to real estate appears of record, but of an equity against him,—such, for instance, as an equity to have a recorded deed reformed so as to include the real estate,—of which the judgment creditor has no notice.

Tenant in Common—Possession—Notice.—A tenant in common of real estate in possession is presumed to be in under his own title, and not in right of his cotenant; and the possession is therefore, of itself, notice only of his own title.

Appeal by plaintiff from a judgment of the district court for Swift county, where the action was tried by *Baxter, J.*

S. H. Hudson and *J. C. Haynes*, for appellant.

Edward E. Webster and *Marshall A. Spooner*, for respondent.

GILFILLAN, C. J. The action is under the statute to determine adverse claims to real estate. On and prior to February 23, 1886, A. G. and W. F. Wilcox each owned an undivided half of a tract of land of 640 acres, constituting one farm, including the land in controversy; and on that day said A. G. and this plaintiff, his wife, executed a deed which was intended to convey the entire farm to one Thornburgh, and he executed a deed of conveyance to plaintiff, the purpose of the two deeds being to vest in her title to the undivided half theretofore owned by A. G. By mistake of the scrivener who drew the deeds, the description of the land in controversy was omitted. The deeds were recorded February 26, 1886. On discovering the mistake, on December 31, 1887, A. G. and the plaintiff executed a conveyance to Thornburgh, and he executed one to plaintiff, both cor-

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48	248
43	541
64	93
43	541
74	129

rectly describing the 640-acre tract. These deeds were recorded February 28, 1888. But meantime, and just prior to recording them, a judgment in favor of this defendant against A. G. Wilcox was docketed in the county. Neither plaintiff nor A. G. Wilcox was ever in personal possession of the land. Up to the execution of the first deed, W. F. Wilcox was in possession, raising and breeding stock for himself and A. G. At the execution of said deed, A. G. transferred his interest in the stock and business to plaintiff, and W. F. continued the business and management of the farm, and to reside upon it as formerly, till the trial. The defendant had no notice of the transactions, unless it might be charged with it from the possession of W. F. The facts with reference to the business were not known to it till after the docketing of its judgment.

The statute giving effect to registration of deeds (Gen. St. 1878, c. 40, § 21) places a docketed judgment upon the same footing as a recorded conveyance, and gives to it precedence over an unrecorded deed, unless the judgment creditor have other notice of the unrecorded conveyance. *Lamberton v. Merchants' Nat. Bank*, 24 Minn. 281; *Dutton v. McReynolds*, 31 Minn. 66, (16 N. W. Rep. 468.) In the absence of notice to the defendant, this would dispose of the case, unless, as plaintiff seems to claim, her mere equity to have the deed reformed makes her position superior to what it would be with a perfect but unrecorded deed. This cannot be. The purpose of the statute is to protect purchasers, and attachment and judgment creditors, against claims to the real estate of which they have no notice by the record or otherwise. This would be as effectually defeated by allowing a mere equity, of which the judgment creditor has no notice, to displace the lien of his judgment, as by allowing a legal unrecorded title to have that effect. The record, as it stood when the judgment was docketed, contained no notice of any right in plaintiff, legal or equitable, except to the land described in her deed.

W. F. Wilcox was a tenant in common of the land. As such, he had a right to the exclusive possession as against all the world but his cotenant. His possession was notice of his own title, but it could not be notice of change of title on the part of his cotenant. He would be presumed to be in of his own right, by virtue of his own

title, and not under his cotenant's title. Notice that he was also holding under his cotenant would undoubtedly be notice also of his cotenant's title. But his mere possession would not be notice that he was in under any one but himself. So that his possession alone was not notice of any equity that had arisen between his original cotenant and the plaintiff.

Judgment affirmed.

T. E. HILLS vs. F. B. RIX and another.

June 23, 1890.

Written Contract—Oral Agreement.—Rule that a prior or contemporaneous oral agreement cannot be proved for the purpose of varying a written contract, applied.

On December 12, 1888, plaintiff and others executed a written instrument agreeing to pay defendants "\$100 for each share of stock set opposite our respective names in the Cleveland Bay Horse Company, which is now being formed at Heron Lake to buy the imported stallion Topthorne at \$1,800," of the defendants, "payments to be made by two joint notes of equal amounts due in one and two years from February, 1889," with interest. Plaintiff subscribed for two shares. At the same time it was orally agreed between the plaintiff and defendants that plaintiff should receive a deduction of \$75 from the price of his shares. On December 22, 1888, the notes required by the agreement were given, each having indorsed upon it: "Paid on the within note \$37.50 by T. E. Hills." At the same time the defendants executed to the company a bill of sale of the horse Topthorne, at the same time agreeing that the company might have the horse Lord Studley in place of Topthorne, if it should so elect within 20 days. The subscribers unanimously chose to take Lord Studley, whereupon the notes already given were surrendered, and defendants demanded new notes for the price, (\$1,800,) which the plaintiff refused to sign. The defendants delivered Lord Studley to the

company, but refused to sell or deliver to plaintiff any shares in the company or any interest in the horse. The plaintiff thereupon brought this action in justice's court to recover \$75—the difference between the value of the shares and the price according to the oral agreement. Plaintiff had judgment, and the defendants appealed, on questions of law only, to the district court for Jackson county, where the action was heard by *Perkins, J.*, on the return of the justice, which included a transcript of the evidence. The court found the facts as above stated, and ruled that the written contract could not be varied by the oral agreement, and reversed the justice's judgment. Plaintiff appeals from the judgment of the district court.

Wilson Boarst and L. F. Lammers, for appellant.

Geo. W. Wilson, for respondents.

GILFILLAN, C. J. The written contract for the sale of the horse to the plaintiff and his associates stated the price at \$1,800, at the rate of \$100 per share for eighteen shares, of which plaintiff subscribed for two. Plaintiff cannot make out his case, as he states it in his complaint and claims it to be on the evidence, without showing that defendants agreed with him to take \$125 instead of \$200 for his two shares. This he offered and was permitted by the justice to show by a prior or contemporaneous oral agreement between plaintiff and defendants to that effect. Of course that was error. The defendants raised the objection on the first opportunity after the written contract was in evidence so that it could be made. The two notes were no part of the contract of sale, but were given some days after its execution and in performance of it.

Judgment affirmed.

WARREN HILL vs. ROBERT B. WEBB.

June 27, 1890.

Partnership Contract—Escrow—Delivery.—The parties signed an instrument embodying the terms of a proposed commercial partnership for five years, with the understanding that it should not operate as a present contract, but should become such only upon the fulfilment of certain conditions, and for that reason the instrument was retained by the scrivener who drafted it. *Held*, that there was no delivery of the instrument, and hence no contract.

Incomplete Contract—Withdrawal.—As long as a proposed contract rests in mere negotiation, either party may withdraw.

Appeal by plaintiff from an order of the district court for Hennepin county, refusing a new trial after a trial before *Lochren, J.*, and a verdict directed for defendant.

Harlan P. Roberts, for appellant.

J. N. Bearnese, for respondent.

MITCHELL, J. This was an action for damages for the refusal of the defendant to fulfil an alleged contract for a commercial partnership between the parties for the term of five years. It appears that the parties, having, during their negotiations, arrived at an understanding as to the terms of the proposed partnership, went to the office of one Bradlee, who, at their instance, drew up duplicate writings embodying these terms, which both parties signed, and left in the custody of Bradlee. It appears from the evidence that among the conditions precedent to consummating the proposed partnership were that the inventory of the stock of merchandise, then owned by the plaintiff, should amount to a certain value; also that defendant should pay in the sum of \$3,800. Plaintiff testifies that, "after the agreements were signed, Mr. Bradlee kept them. He said he would hold them until Mr. Webb had paid the money over, which was to be the next day." He further says: "It [the contract] was to all intents and purposes, as far as I was concerned, concluded. There was nothing further to be done, only for Mr. Webb to pay over his share of the money." Defendant testifies: "The contracts were left

with the Commission Syndicate people until something was performed on my part, and something performed on the part of Mr. Hill. * * * They were not delivered that night, because the deal had not been consummated. They had no right to deliver them to any one. Mr. Hill was to furnish an inventory that was to show between \$10,000 and \$12,000. I was to pay \$2,000 in cash and a piece of real estate. The contract was left there to have the deed consummated as regards my own part, and on part of Mr. Hill." The next day, defendant went to Bradlee's office, and got the writings, and destroyed them, claiming the deal off, because plaintiff's inventory did not show the amount agreed on. Plaintiff, on the other hand, claims that the inventory amounted to as much as he agreed it should. This is substantially all the evidence on the subject of the making of a contract.

While the parties disagree as to which one is responsible for the proposed partnership not being consummated, yet it appears clearly from the testimony of both that no contract was ever in fact closed; that the whole thing still rested in mere negotiation. There may be a good verbal contract, though intended to be afterwards put in writing; and, on the other hand, there may be a writing signed by the parties, and yet no contract. In this case it is evident that the parties signed these writings upon the terms and with the understanding that they should not operate as a present contract, but should become so only upon the fulfilment of certain conditions. While a manual passing over of an instrument is not essential, yet, to constitute a delivery, the party delivering must relinquish his power over it in some way, with an express or implied intent that it shall operate as a contract. It is evident in this case that neither party relinquished his power over these papers, or intended to do so until the fulfilment of some conditions. There was therefore no delivery, and, this being so, it is immaterial which party was the cause of the contract not being consummated; for, as long as the matter rested in negotiation, either party could withdraw at his pleasure. The court was therefore right in dismissing the action.

Order affirmed.

EDWIN GROESBECK *vs.* CORA B. MATTISON and others.

43	547
73	359

June 27, 1890.

Mortgage—Release to Grantee of Part Primarily Liable—Subsequent Bona Fide Purchaser.—Where the holder of a mortgage releases to a grantee of the mortgagor that part of the mortgaged premises which, as between the mortgagor and his grantee, has become primarily liable for the payment of the debt, and another person, on the faith of such release, purchases the premises and pays a valuable consideration therefor, the fact that such release may have affected injuriously the lien of the mortgage on the remaining security, in a way not known or anticipated at the time by the holder of the mortgage, furnishes no ground for avoiding the release to the prejudice of the purchaser of the premises released.

Same—Conveyance of Part of the Premises by Mortgagor—Covenant by Grantee to Pay Mortgage—Subsequent Release to such Grantee by Mortgagee with Notice.—Where the mortgagor conveys to another a part of the mortgaged premises, the deed containing a provision that the grantee shall, as part of the purchase price, pay the entire mortgage, the part thus conveyed becomes, as between the mortgagor and his grantee, primarily liable for the payment of the debt; and if a holder of the mortgage, chargeable with actual notice of that fact, releases to the grantee of the mortgagor that part of the premises thus conveyed, which in value exceeds the amount of the mortgage, such release operates as a discharge of the mortgage upon the remainder of the premises retained by the mortgagor.

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Action to foreclose a mortgage, brought in the district court for Hennepin county against Cora B. Mattison and husband, the mortgagors, and Peter T. Waters, and tried by *Rea, J.*, who ordered judgment for defendants, which was entered, and the plaintiff appealed.

R. H. Day and H. L. Enches, for appellant.

Ankeny & Merrill, for respondents Mattisons.

W. H. Norris, for respondent Waters.

MITCHELL. J. The contest in this case was a triangular one. The defendants Mattisons and the defendant Waters each interposed a several answer to the complaint; the defendants Mattisons also alleging matters as a basis for affirmative relief against their codefendant, Waters, and to which Waters interposed a reply. The plaintiff interposed replies to the several answers of the defendants. The defendants each made a motion for judgment against plaintiff on the pleadings, which the court granted, and from that judgment plaintiff appeals. Therefore the only question involved in this appeal is whether sufficient of the allegations of the answers stood admitted by the plaintiff to entitle the defendants, or either of them, to judgment in their favor against him. But the triangular nature of the contest; the number of the pleadings; the fact that counsel do not always distinguish between what is in issue or what stands admitted as between two of the parties, and what is in issue or what is admitted as between one of these two and a third party; coupled with the fact that the replies of plaintiff are, as to some matters, very vague, or else purposely evasive,—have much complicated the case, and rendered it a task of some difficulty to determine just how the facts do stand on the pleadings. We shall first state such facts as are admitted by all parties.

In 1884 the defendants Mattisons executed to one Brookhouse a mortgage for \$1,000 on the whole of lot 6, block 9, in Wright's addition to Minneapolis, of which the defendant Cora B. Mattison was then the owner. This mortgage was recorded on the day of its execution. On the 11th day of February, 1887, the Mattisons conveyed the front 75 feet of the lot to one Turner; it being expressly stipulated in the deed that Turner, as part of the purchase price, assumed and agreed to pay the mortgage. Mrs. Mattison still owns the remainder of the lot. By deed dated July 23, 1888, Turner sold and conveyed the 75 feet to one Swain; the deed likewise reciting and stipulating that Swain assumed and agreed to pay the Brookhouse mortgage. By deed dated July 23, 1888, Swain conveyed the 75

feet by warranty deed to defendant Waters, who paid therefor \$1,000 in cash, and some real estate, which he conveyed to Swain. This sale was negotiated through one L. H. Cole, as agent for Swain. July 27, 1888, Brookhouse assigned his mortgage to Elmer E. Cole, the son of L. H. Cole; and on the same day Elmer E. Cole executed to Swain, "grantee of Mattison," a release of the 75 feet from this mortgage; and also on the same day, but subsequent to the partial release to Swain, assigned the mortgage to plaintiff, who brings this action to foreclose it against the whole lot. All these instruments, —to wit, the deeds from the Mattisons to Turner, from Turner to Swain, from Swain to Waters, the assignment from Brookhouse to Elmer E. Cole, the partial release from Cole to Swain, and the assignment from Cole to plaintiff,—were all filed for record on the same day, viz., July 27, 1888.

Turning, next, to the issues between plaintiff and defendant Waters, we find that Waters alleges that, in consideration of the conveyance to him from Swain, and in order to get a clear title of the property thus conveyed, and in consideration of a promise to have the mortgage referred to released, he paid over the purchase-money, and as a part of the same transaction Cole released the portion of the lot purchased by him; in short, that Waters bargained to get a clear title, and parted with the purchase-money on the strength of the contemporaneous release by Cole, which gave him the title he bargained for. Plaintiff admits, by not denying, the transaction on part of Waters as alleged, except that he says that Waters paid the \$1,000 to L. H. Cole, the agent of Swain, and not to Elmer E. Cole,—a fact which, if true, is not material for present purposes. It is also true that he alleges that the release executed by Elmer E. Cole was made without consideration. In view of the admitted fact that Waters paid his money for a clear title, this allegation can only mean that no consideration for the release was received by Cole. But this is not important, for, if Cole saw fit, in order to enable Swain, or whoever owned the property, to give a clear title, to gratuitously execute a release, he had a perfect right to do so; and if, on the strength of that release, or of a promise that it should be given, Waters parted with the purchase price and accepted the conveyance, that would

constitute ample consideration for the release, and Cole could not be heard to claim, to the prejudice of Waters, that he himself received no consideration. Plaintiff also alleges that Waters, when he purchased from Swain, had knowledge of the covenants and stipulations in the deeds from Mattisons to Turner, and from Turner to Swain, by which this 75 feet became the primary fund for the payment of the mortgage. As these deeds were in Waters's chain of title, he is doubtless chargeable with notice of their contents. But, whatever might be the materiality of this fact as between the Mattisons and Waters, we fail to perceive its importance as between Waters and Cole or his assignee. Waters was not Cole's guardian, and owed him no active duty. All Waters was interested in was to get a clear title to the property he was buying, and if Cole saw fit to release it from the mortgage it was his own lookout to see that such a release would not affect his remaining security. There is no allegation that Cole executed the release under any mistake of fact, or that Waters was guilty of any fraud towards him. It is therefore impossible to see any ground upon which Cole could repudiate the release which he voluntarily executed, and upon the faith of which Waters has paid the purchase price of the property. The fact that it may have had an effect upon his remaining security which he did not anticipate at the time is certainly no ground for restoring the lien of the mortgage in his favor as against Waters. Plaintiff admits that he knew of this release when he purchased the mortgage. Therefore, certainly he is in no better position than Cole, his assignor. The trial court was therefore clearly right in ordering judgment against plaintiff in favor of Waters.

We next come to consider the pleadings between plaintiff and the Mattisons. The Mattisons allege in their answer that, when Cole executed the release to Swain, he had knowledge of the terms and contents of the deeds from them to Turner, and from the latter to Swain, and that plaintiff also knew all these facts when he bought the mortgage of Cole. They also set up *in hæc verba* the release from Cole to Swain, who is therein described as "grantee of Cora B. Mattison." Plaintiff in his reply admits the execution of the release by Cole to Swain; also that he knew of its execution when he bought the

mortgage; but alleges that he was informed and believed that it was executed with the knowledge and consent and in the interest of the Mattisons, and that Mrs. Mattison was the owner of the whole lot. He admits the execution and terms of the deeds from the Mattisons to Turner, and from Turner to Swain, but denies that he had any knowledge of them when he bought the mortgage, and alleges that he has no knowledge or information sufficient to form a belief as to whether Cole knew of them when he executed the release to Swain. It is not denied that the value of the 75 feet released to Swain was equal to and in excess of the amount of the mortgage. It cannot be doubted that, upon the facts of the case, the 75 feet became, as between the Mattisons and Turner or Swain, primarily liable for the payment of the mortgage debt, for which the remaining part of the lot owned by the Mattisons occupied the position of surety, and that if a holder of the mortgage, chargeable with notice of that fact, released the 75 feet, it would operate as a release of Mattisons' part, the former being sufficient in value to satisfy the whole debt. The only question remaining, therefore, is whether enough is admitted in the pleadings to charge Cole with such notice at the time he relinquished his lien on the 75 feet.

The plaintiff invokes the familiar doctrine that a mortgagee whose mortgage is recorded is not bound to take notice of subsequent conveyances or incumbrances by the mortgagor; and that the record of such subsequent conveyances of a part of the mortgaged premises is not constructive notice to the mortgagee. The trouble is that, while this is good law, it does not cover this case. Had the Mattisons conveyed to Turner by warranty deed, so that the remaining part of the lot would have been primarily liable for the mortgage, and then the mortgagee without actual notice of this conveyance had executed to the Mattisons a release of their part, the rule invoked would apply. But in this case Cole released, not to the Mattisons, but to Swain, "grantee of Cora B. Mattison." By the very terms of his release, he stands conclusively charged with actual notice of the fact that Mrs. Mattison had made a conveyance of the 75 feet through which Swain had acquired title; and, knowing that fact, he was bound to ascertain the terms of that conveyance, or execute the release at his peril.

It is no excuse that the deed may not then have been on record. He knew that such a deed had been executed, and he was bound to call for it and inspect its provisions, or take the chances of not doing so. The Mattisons had not requested him to execute any release, and, if he assumed to execute one to their grantee, known to him to be such, good faith required him first to ascertain from them, or from their deed, whether it would prejudice their rights. Plaintiff stands in no better position than his assignor, Cole, especially as he knew of the release to Swain when he purchased the mortgage. Through inadvertence or ignorance of the law he may have made an unfortunate purchase, but, whatever other remedy he may have, he certainly has none, upon the admitted facts, against the defendants.

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- A person imprisoned under sentence for violation of a void law or ordinance may be discharged on *habeas corpus*. *In re White*, 250.
- An ordinance punishing persons for peddling without a license *held* valid. *Id.*
- What acts and declarations of one conspirator are admissible in evidence against the others. *State v. Thaden*, 253.
- Objection to question to a juror on *voir dire*, for the purpose of a challenge, *held* properly excluded as covered by a former answer. *State v. Frelinghuysen*, 265.
- Proper mode of objection to improper remarks of prosecuting counsel to the jury. *Id.*
- Variance between indictment and proof as to the initial of middle name of a person charged to have been injured by forgery, *held* immaterial. *State v. Tall*, 273.
- Evidence *held* sufficient for a conviction of forgery. *Id.*
- New trial for newly-discovered evidence *held* properly refused, the witness having been offered by the state and objected to by the defendant upon the trial. *Id.*
- On a joint indictment against several, the court, on motion of the state, may direct the trial to proceed against one. Failure to enter formal order for separate trial *held* not ground for a new trial. *State v. Thaden*, 325.
- A promise connected with a false pretence may be alleged and shown as a part of the charge, if the representations of past or existing facts are sufficient. *Id.*
- On a joint indictment against two, one defendant may be a witness for the state against the other. *Id.*
- On an indictment for acting as agent for a foreign insurance company without proper certificate, it is immaterial that the company had or had not complied with the statute. Evidence *held* insufficient to sustain a verdict of guilty. *State v. Johnson*, 350.
- An ordinance prohibiting sales of liquor without a license, not specifying any quantity, is valid, certainly as to sales of quantities less than five gallons. Who may question its validity. *State v. Priester*, 373.
- Effect of a general verdict of guilty on a trial of an indictment for larceny of several articles of value specified. *State v. Colwell*, 378.
- Admissibility, on a trial for bigamy, of defendant's admission, as showing his belief, at the time of his second marriage, that his former wife was alive. *State v. Plym*, 385.
- Nature of presumption of continuance of life. Weight of such presumption on trial for bigamy. *Id.*
- An act is not made criminal by statute unless such intent is apparent beyond serious doubt. The statute making it criminal to displace, remove, or destroy specified railway structures, or structures appertaining

CRIMINAL LAW—Continued.

to or connected with railways, *held* not applicable to a fence. *State v. Walsh*, 444.

Indictment for seduction *held* sufficiently to show that the prosecutrix was, at the date of the offence, of previous chaste character. *State v. Framness*, 490.

Slight error in entitling the verdict, as "Farmness" for "Framness," *held* immaterial. *Id.*

Where a case is appealed on a bill of exceptions, no errors will be considered not affirmatively shown by the return. *Id.*

The statute imposing a fine or imprisonment in state prison, or both, the court cannot make the sentence in the alternative; and where it imposes a fine, it cannot enforce payment by imprisonment in the state prison. *Id.*

See EVIDENCE, 196, 253, 273.

CUSTOM AND USAGE. See CONTRACT, 181; EVIDENCE, 88, 289, 423; NEGLIGENCE, 88.

DAMS AND MILLS.

The plaintiff, being authorized by act of congress to build a dam across the Mississippi river, must take all needful precautions against injury to its works from jams of logs caused by the slack water which they create. *St. Cloud Water Power Co. v. Miss. & Rum River Boom Co.*, 380.

DAMAGES.

In action on a note, a counterclaim for damages for breach of a contract which furnished its only consideration may be pleaded. For any breach of contract nominal damages at least are recoverable. *Burns v. Jordan*, 25.

For destruction of a chattel its market value is recoverable. Such value as a rule is not shown by evidence of its intrinsic qualities. What additional evidence is required. *Harrow v. St. Paul & Duluth R. Co.*, 71.

Recoverable for partial performance of a building contract, in case of substantial compliance. *Elliott v. Caldwell*, 357.

In an action by a timber-culture claimant for destruction of trees, he may recover the value they added to the land, shown by proof of its value with the trees on it, and with the trees destroyed. *Carner v. Chicago, St. Paul, M. & O. Ry. Co.*, 375.

For breach of covenant against incumbrances in a deed conveying lands for an entire consideration. The grantor cannot show that as to part of the land the conveyance was gratuitous. *Bruns v. Schreiber*, 468.

In suit on injunction bond, what counsel fees are recoverable. *Lamb v. Shaw*, 507.

As to compensation in condemnation proceedings. See EMINENT DOMAIN, 524.

DEBTOR AND CREDITOR. See CHATTEL MORTGAGE; CONTRACT, 221; EXECUTION, 505; FRAUDULENT CONVEYANCE; INSOLVENCY; MORTGAGE; PAYMENT; SALE.

DECEASED PERSONS, (ESTATES OF.) See ESTATES OF DECEDENTS.

DECEIT. See FRAUD.

DECLARATION. See EVIDENCE, 163, 253.

DEED. See CONVEYANCE; MORTGAGE.

DEFAULT. See **PRACTICE**, 191, 195.

DELIVERY. See **CONTRACT**, 149, 186, 545; **SALE**, 154.

DEMAND. See **CONTRACT**, 186.

DESCRIPTION. See **CHATTEL MORTGAGE**, 56; **CONVEYANCE**, 60; **EMINENT DOMAIN**, 104; **EXECUTION**, 513; **MECHANIC'S LIEN**, 449; **MORTGAGE**, 485; **TAXES**, 60, 69.

DISMISSAL. See **PRACTICE**, 160, 459.

DIVORCE. See **HUSBAND AND WIFE**, 31.

ELECTION. See **INSURANCE**, (OTHER,) 367.

EMINENT DOMAIN.

Condemnation by a railway company of upland abutting on navigable water held to embrace also the riparian right of improvement and occupancy of submerged land, although not specially mentioned, and although, in the description, in the petition, of other tracts belonging to other persons, such rights are specified. *Hanford v. St. Paul & Duluth R. Co.*, 104.

To what compensation a railway company is entitled where a highway is laid across its tracks. *State v. Shardlow*, 524.

What constitutes a public use for which a railway company may condemn. *Chicago, B. & N. R. Co. v. Porter*, 527.

On the hearing of a petition for commissioners, the petitioner must prove its incorporation. *Id.*

ESTATES IN REAL PROPERTY.

Tenancy by entirety does not exist in this state. *Wilson v. Wilson*, 398.

ESTATES OF DECEDENTS.

What evidence is admissible on an issue of undue influence in the making of a will. What constitutes such influence. *Mitchell v. Mitchell*, 78.

Plaintiff held entitled to recover the value of services rendered his deceased uncle, without any express agreement for compensation, but with a mutual understanding that he should be compensated by adequate provision in his uncle's will. *Schwab v. Pierre*, 520.

ESTOPPEL.

On an application for an order that creditors may receive dividends without filing releases, the debtor held not estopped to deny ever having had property that he had previously included in a property statement to creditors, on the faith of which credit was given. *In re Welch*, 7.

Requisites of estoppel *in pais*. Married woman held not estopped from contesting her sole deed on the ground of her incapacity to make it. *Nell v. Dayton*, 242.

Distinction between waiver and estoppel. *Masonic Temple Ass'n v. Channell*, 353.

An administrator, who was also guardian of minor heirs, conveyed lands to a railway company. The heirs held not estopped to contest the validity of the conveyance by the fact that the money realized was paid by the administrator on claims against the intestate's estate. *Burrell v. Chicago, Mil. & St. Paul Ry. Co.*, 363.

See **INSOLVENCY**, 505.

EVIDENCE.

The entire testimony of a witness at a former trial held properly admitted for impeachment. *Bennett v. Syndicate Ins. Co.*, 45.

EVIDENCE—Continued.

Parol evidence admitted to apply description in deed of water-front and land under water. *Eastman v. St. Anthony Falls W.-P. Co.*, 60.

Proper mode of proving market value of a chattel. Evidence of intrinsic qualities is not enough. *Harrow v. St. Paul & Duluth R. Co.*, 71.

Admissible on issue of undue influence in case of a will. *Mitchell v. Mitchell*, 73.

Usage or custom not admissible to justify or excuse act negligent in itself. *Larson v. Ring*, 88. See *infra*, 289, 423.

Memoranda made by a deceased person of facts known to him, *held* admissible as declarations against his interest. *Zimmerman v. Bloom*, 163.

Prior oral agreement to introduce gas and water into premises, *held* inadmissible where the lease was in writing. *McLean v. Nicol*, 169.

Refusal to strike out parol evidence of contents of telegram not shown to be lost or destroyed, *held* error. *Nichols v. Howe*, 181.

Former conviction of a witness may be proved by his cross-examination. *State v. Adamson*, 196.

A witness' testimony in explanation of his conduct *held* admissible. *Id.*

To identify mortgaged chattels, *held* insufficient. *Game v. Whaley*, 234.

In what cases a witness may refuse to testify because his testimony would criminate him. *State v. Thaden*, 253; *State v. Tall*, 273.

What acts and declarations of one conspirator are admissible against the others. Declarations after issue of forged paper, but before division of proceeds, *held* admissible. *State v. Thaden*, 253.

In what cases a party may cross-examine his own witness. *State v. Tall*, 273.

Asking a witness if he had made a certain statement to his attorney, *held* proper. *Id.*

Formal reception of newspapers, not read to jury, *held* not prejudicial error. *Id.*

Letter of witness *held* admissible to impeach him. *Id.*

Motion to strike out *held* too broad. *Id.*

Proper form of question to medical expert. *Jones v. Chicago, St. Paul, M. & O. Ry. Co.*, 279.

Physician may give opinion based partly on statements of patient while being examined by him. *Id.*

When sued for injury to a child playing with a turn-table, etc., the defendant may show that it secured such turn-table in the way customary with railway companies; but this is not conclusive of due care. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 289. See *infra*, 423.

Parol evidence of fraud or illegality is admissible to defeat a written contract. *Lewis v. Willoughby*, 307.

Representations of value, when admissible in an action for fraud in a sale. *Haven v. Neal*, 315.

Fire set by locomotive. Evidence requisite to rebut presumption of negligence. Presumption *held* rebutted. *Daly v. Chicago, Mil. & St. Paul Ry. Co.*, 319. Presumption *held* not rebutted. *Hoffman v. Chicago, Mil. & St. Paul Ry. Co.*, 334; *Doyscher v. Same*, 427; *Wilson v. Northern Pacific R. Co.*, 519.

In what cases, on trial for false pretences, a promise may be shown as part of the pretences. *State v. Thaden*, 325.

Admissibility of a defendant as witness for the state against a co-defendant. *Id.*

Testimony as to value of horses *held* inadmissible. *Whitney v. Swenson*, 337.

EVIDENCE—Continued.

- Identity of name as proof of identity of person. *Morris v. McClary*, 346.
- Two concurrent insurance policies construed together to ascertain property insured. *Schreiber v. German-American Hail Ins. Co.*, 367.
- Of sale, when an order is given by telephone, and the article ordered was sent to the buyer. *State v. Priester*, 373.
- Of value of growing trees, in an action for destroying them. *Carner v. Chicago, St. Paul, M. & O. Ry. Co.*, 375.
- On trial for bigamy, defendant's admission about the time of his second marriage, *held* admissible to show his belief that his first wife was then alive. *State v. Plym*, 385.
- Nature and strength of the presumption of continuance of life. *Id.*
- As against a stranger a judgment is not evidence of the prior existence of the debt for which it was rendered. *Bloom v. Moy*, 397.
- Error in admitting void city ordinance *held* cured by instructions. Different rule where evidence is of facts. *Dugan v. St. Paul & Duluth R. Co.*, 414.
- Proof of general custom to run extra trains without notice to section-men, *held* competent on the question of negligence. *Larson v. St. Paul, M. & M. Ry. Co.*, 423. See *supra*, 88, 289.
- Admission *held* to waive objection to admission of "train record." *Id.*
- Proof requisite to show a tender of the amount due on a chattel mortgage. *Moore v. Norman*, 428.
- Action to enforce a lien against a wife's property for work under a contract made by her husband. Evidence that she saw the work going on *held* admissible against her. *McCarthy v. Caldwell*, 442.
- On what the jury may act in estimating probable duration of life. Life-tables not essential, though admissible. *Deisen v. Chicago, St. Paul, M. & O. Ry. Co.*, 454.
- Of oral agreement, *held* inadmissible to show that as to part of the granted lands a covenant against incumbrances was gratuitous. *Bruns v. Schreiber*, 468.
- In condemnation proceedings, a railway company must prove its incorporation. *Chicago, B. & N. R. Co. v. Porter*, 527.
- Parol evidence *held* inadmissible to show that one signing a contract in his own name contracted merely as agent. *Williams v. Journal Printing Co.*, 537.
- Application of rule that a written contract cannot be varied by proof of a prior or contemporaneous oral agreement. *Hills v. Rix*, 543.

EXCEPTION. See PRACTICE, 196.

EXCEPTIONS, (BILL OF.) See APPEAL, 196, 490.

EXECUTION.

- Sale of land. Waiver by purchaser of strict legal rights as to redemption. Notice and reasonable time thereafter must be given judgment debtor. *Tice v. Russell*, 66.
- Owner of goods taken on execution against another may bring replevin against the sheriff. *Whitney v. Swensen*, 337.
- Levy under void judgment. Liability of attorney and of party. *Farmer v. Crosby*, 459.
- Void assignment for creditors. Levy on assigned property, when good as against subsequent insolvency proceedings; how enforced. Petitioners for receiver *held* estopped to attack levy. *Bean v. Schmidt*, 505.
- Levy and sale of purchaser's interest in land under contract of sale. *Reynolds v. Fleming*, 513.

EXECUTION—Continued.

Description in levy and certificate of sale need not designate specific interest of purchaser. *Id.*

EXECUTOR. See ESTATES OF DECEDENTS.

EXEMPTION. See TAXES, 344.

EXPERT. See EVIDENCE, 279.

FENCE. See RAILWAY, 444.

FIRE. See RAILWAY, 319, 334, 375, 427, 519.

FIXTURES. See MORTGAGE, 485.

FORECLOSURE. See MORTGAGE, 16, 172, 211.

FORGERY. See CRIMINAL LAW, 196, 273.

FRAUD.

False representations as to title to land *held* not actionable under the circumstances. *Cobb v. Wright*, 83.

Promptness necessary in disaffirming a lease for fraud. Right *held* lost. Query, whether plaintiff had also waived his right to damages. *Bell v. Baker*, 86.

Purchase of stock from a corporation by its president, *held* voidable, had it not been ratified. *St. Croix Lumber Co. v. Mittlestadt*, 91.

In sale of goods, how shown. Positive representations by a seller in position to know the facts. Representations of value. Remedies of buyer. Receipt and retention of goods *held* not a waiver of action for damages. *Haven v. Neal*, 315.

What constitutes an "intent to cheat and defraud" in disposal of property by an insolvent. *In re Shotwell*, 389. And see *In re Welch*, 7.

See CRIMINAL LAW, 325

FRAUDS, (STATUTE OF.) See LANDLORD AND TENANT, 166; SALE, 154.

FRAUDULENT CONVEYANCE.

Action to avoid. Requisites of complaint. Who may sue. *Sawyer v. Harrison*, 297.

Transfer sustained on the evidence. *Whitney v. Swensen*, 337.

Effect of judgment as evidence in suit by the creditor to set aside transfer. *Bloom v. Moy*, 397.

See INSOLVENCY, 7, 389.

GARNISHMENT. See PRACTICE, 191.

GUARANTY. See NEGOTIABLE INSTRUMENT, 466.

GUARDIAN AND WARD.

Effect of approval and confirmation by the probate court of a sale and conveyance to a railway company. It does not prove the guardianship. *Burrell v. Chicago, Mil. & St. Paul Ry. Co.*, 363.

Alleged wards *held* not estopped to claim the land. *Id.*

HABEAS CORPUS. See CRIMINAL LAW, 250.

HIGHWAY.

Waiver of defect in bond on appeal from a justice. Compensation allowable to railway company where a highway is laid across its tracks. *State v. Shardlow*, 524.

HIGHWAY—Continued.

Obstruction of streets in cities. See **MUNICIPAL CORPORATION**, 204.

See **CONSTITUTION**, 524.

HOMESTEAD. See **INSOLVENCY**, 7.**HOMESTEAD, (UNDER U. S. LAWS.)**

Rights of deserted wife in possession. Relinquishment by husband alone. *Michaelis v. Michaelis*, 123.

HUSBAND AND WIFE.

A decree for limited divorce does not bar an action for absolute divorce for any statutory cause. *Evans v. Evans*, 31.

Rights of deserted wife in possession of a congressional homestead claim.

Relinquishment by husband alone. *Michaelis v. Michaelis*, 123.

Wife held not estopped, in this case, from contesting her sole deed on the ground of incapacity to make it. *Nell v. Dayton*, 242.

Joint power from husband and wife to sell wife's land for value and to convey. Conveyance by agent, without consideration, by parol direction of wife alone, held not void. *Dayton v. Nell*, 246.

On a grant to husband and wife, they take as tenants in common, unless declared to take as joint tenants. Estates by the entirety do not exist in this state. *Wilson v. Wilson*, 398.

Rights of surviving wife in lands conveyed by her husband alone during coverture. *Goodwin v. Kumm*, 403.

Evidence held competent to show wife's authority to her husband to charge her property with a mechanic's lien. *McCarthy v. Caldwell*, 442.

A deed or mortgage of her land by an infant wife, her husband joining, is valid. *Daley v. Minn. Loan, etc., Co.*, 517.

ILLEGAL CONTRACT. See **CONTRACT**, 149; **INTEREST AND USURY**.**INDEMNITY**. See **CONVEYANCE**, 126; **MASTER AND SERVANT**, 496.**INDICTMENT**. See **CRIMINAL LAW**, 196, 325, 490.**INFANT**. See **HUSBAND AND WIFE**, 517; **NEGLIGENCE**, 289.**INJUNCTION**. See **BOND**, 507; **COUNTIES**, 500; **DAMAGES**, 507; **MASTER AND SERVANT**, 496; **MORTGAGE**, 1.**INSOLVENCY**.

What must be shown in order to a finding of a fraudulent intent on part of a debtor in disposing of his property, so as to enable creditors to receive dividends without filing releases. *In re Welch*, 7; *In re Shotwell*, 389.

Purchase of a homestead in his wife's name and making false property statement by the debtor, held not sufficient. Such statement held not an estoppel. *In re Welch*, 7.

Assignment regular on its face cannot be attacked in collateral proceedings, though the facts did not exist which the statute makes prerequisite to assignment. *Second Nat. Bank v. Schranck*, 38.

"Intent to cheat and defraud creditors," such as will dispense with releases by them, defined. *In re Shotwell*, 389. See *supra*, 7.

The debtors, (partners,) on the eve of assignment, each took \$600 from the firm's moneys for support of their families. Held not to show a fraudulent intent. *Id.*

A refusal to disclose or dishonest disclosure, while it may show fraudulent intent in concealing or disposing of property, will not of itself dispense with releases. *Id.*

INSOLVENCY—Continued.

In what cases an execution levy will be good as against subsequent insolvency proceedings. Mode of enforcing such levy. Creditors basing their petition on the fact of such levy cannot dispute its validity. *Bean v. Schmidt*, 505.

Receiver cannot be retained merely to get assets for his own compensation. Order of discharge without payment, that being left for further order, held properly granted. *Joslyn v. Athens Coach & Car Co.*, 534.

INSURANCE, (IN GENERAL.)

On a trial for acting as agent of a foreign insurance company without the statutory certificate, the company's compliance with the law is immaterial. Evidence held not to show agency. *State v. Johnson*, 350.

INSURANCE, (FIRE.)

Company held entitled to recover on premium note, though the policy provided that the insurance should be suspended during default. *Minn. Farmers' Mut. Fire Ins. Ass'n v. Olson*, 21.

Waiver of payment of premium by local agent held forbidden by terms of policy. *Wilkins v. State Ins. Co.*, 177.

INSURANCE, (OTHER.)

Condition as to false representations held to make policy voidable and not void. If company avoid, it must be *in toto*. Waiver of right to avoid by suit for premium. *Schreiber v. German-American Hail Ins. Co.*, 367.

Two concurrent policies construed together, to ascertain the property insured. *Id.*

Appraisal of loss without notice to insured held not binding on him. *Id.*

INTEREST AND USURY.

Plaintiff in replevin, suing as mortgagee of renewal mortgage, proved on the trial to be usurious, cannot recover under the original mortgage. *Barrows v. Thomas*, 270.

Bonus exacted by lender's agent; when it makes the loan usurious. Evidence held to show usury. *Lewis v. Willoughby*, 307.

Oral evidence is admissible to show usury, though the contract is in writing. *Id.*

A charge to cover expenses in examining title, etc., and the running of interest between the execution and acceptance of securities, held not usurious. *Daley v. Minn. Loan, etc., Co.*, 517.

INTOXICATING LIQUOR. See CRIMINAL LAW, 231, 373; MUNICIPAL CORPORATION, 373.**JOINDER OF CAUSES OF ACTION. See PLEADING, 176.****JUDGMENT.**

An action to set aside for want of jurisdiction will lie though there is a remedy by motion. The action will lie against an assignee, and plaintiff need not show the claim to be unjust. *Magin v. Lamb*, 80.

Set-off of judgments refused in case of assignment. *Wyvell v. Barwise*, 171.

Remedy of garnishee for excessive judgment against him on default. *Segog v. Engle*, 191.

By default. Successive motions for relief on same facts not permitted. *Weller v. Hammer*, 195.

Effect of bond and stipulation to abide a judgment in a criminal case. *State v. Sawyer*, 202.

JUDGMENT—Continued.

Allowance of credits in one action *held* to preclude a subsequent action for them. *Ebert v. Long*, 235.

Power of court to correct clerical errors (in this case to substitute new findings and judgment) more than one year after judgment. *McClure v. Bruck*, 305.

Effect of probate court's confirmation of guardian's sale to railway company. *Burrell v. Chicago, Mil. & St. Paul Ry. Co.*, 363.

Effect of judgment as evidence in suit by creditor to avoid fraudulent conveyance. *Bloom v. Moy*, 397.

Former judgment against plaintiff's assignor in suit to obtain stock certificates in place of lost ones, *held* conclusive on plaintiff. *Guilford v. W. U. Tel. Co.*, 434.

Liability of attorney and of party for a levy under a void judgment. *Farmer v. Crosby*, 459.

Against school-district, from what fund payable. *School-Dist. No. 31 v. Roach*, 495.

Priority of docketed judgment over an equity to reform a recorded deed. *Wilcox v. Leominster Nat. Bank*, 541.

See CRIMINAL LAW, 490; MUNICIPAL COURT, 158; TAXES, 69, 493.

JURY. See CRIMINAL LAW, 196; PRACTICE, 45.

JUSTICE OF THE PEACE.

Dismissal of appeal, instead of affirmance, *held* harmless error. *Schroeder v. Harris*, 160.

See MUNICIPAL COURT, 41, 539; PLEADING, 458,

LACHES.

Not a bar to a suit for legal relief on a legal title. *Morris v. McClary*, 346.

LAKE. See WATERS, 192.

LANDLORD AND TENANT.

Promptness requisite in disaffirming a lease for fraud. *Bell v. Baker*, 86.

A parol lease for one year from a future day is within the statute of frauds. *Jellett v. Rhode*, 166.

Prior oral agreement to introduce gas and water *held* inadmissible to vary written lease. *McLean v. Nicol*, 169.

Possession of tenant as notice to a judgment creditor of the lessor's rights, but not of an unrecorded deed of the lessor, though known to the tenant. *Wilkins v. Bevier*, 213.

LARCENY. See CRIMINAL LAW, 378.

LEASE. See LANDLORD AND TENANT, 86, 166, 169.

LEVY. See EXECUTION, 459, 513.

LICENSE.

Of employment agencies by state and city. *Moore v. City of Minneapolis*, 418.

LIEN.

Of livery-stable keeper depends on possession, and is lost by surrendering it. *Ferriss v. Schreiner*, 148.

See CHATTEL MORTGAGE; JUDGMENT, 541; MECHANIC'S LIEN; MORTGAGE; VENDOR AND PURCHASER, 473.

LIMITATIONS, (STATUTE OF.) See POSSESSION, 346; STATUTE OF LIMITATIONS.

LOGS.

- Record of log-mark is only *prima facie* evidence of title. *Fox v. Ellison*, 41.
 Boom company *held* entitled to charge toll for logs that came accidentally within its limits, having broken away and been carried down by a great freshet. Such logs *held* to have been "driven." *St. Louis Dalles Imp. Co. v. C. N. Nelson Lumber Co.*, 130.
 Company authorized to build a dam across a navigable stream *held* bound to protect its works from jams of logs caused by them. *St. Cloud W.-P. Co. v. Miss. & Rum River Boom Co.*, 380.

MALICIOUS PROSECUTION.

- Liability of attorney and of party for improper issue of process. In action for malicious prosecution, malice being disproved, plaintiff *held* entitled to recover from the party, but not from the attorney, damages for execution issued and levied on a void judgment. *Farmer v. Crosby*, 459.

MANDAMUS.

- Will not be granted where it must prove unavailing—as where respondent has gone out of office. *State v. Archibald*, 328.
 May be brought by tax-payer against assessor to compel assessment. *Id.*

MASTER AND SERVANT.

- Plaintiff, a wiper in a round-house, injured while making a coupling, *held* not negligent. *Rahman v. Minn. & N. W. R. Co.*, 42.
 Company *held* negligent, and brakeman not negligent, where the latter, while on the outside ladder of a box-car, was struck by a signal-post between the tracks. *Johnson v. St. Paul, M. & M. Ry. Co.*, 53.
 It is not a defence for one violating a law that he was a servant acting under another's direction. *City of Duluth v. Mallett*, 204.
 Complaint by fireman *held* sufficiently certain in its statement of defect in locomotive. *Orth v. St. Paul, M. & M. Ry. Co.*, 208.
 Laws 1887, c. 13, making railway companies liable to servants injured by negligence of fellow servants, applies only to servants engaged in hazard of operating the road, not to those engaged in repairing a bridge. *Johnson v. St. Paul & Duluth R. Co.*, 222.
 Brakeman injured while making a coupling *held* not negligent, and the company *held* negligent. *Stewart v. St. Paul, M. & M. Ry. Co.*, 268.
 Defendant *held* liable for his servant's negligence in setting a fire which destroyed plaintiff's property. *Ellegard v. Ackland*, 352.
 Section-man, run down by snow-plough, *held* chargeable with notice of the running of extra trains, and to have assumed the risk. Company's duty in respect to giving notice. *Larson v. St. Paul, M. & M. Ry. Co.*, 423.
 Master *held* liable to indemnify servant for consequences to him of acts done by master's direction in violation of an injunction known to master but not to servant. Grounds of master's liability. *Guirney v. St. Paul, M. & M. Ry. Co.*, 496.
 Complaint *held* not to show servant negligent or to have assumed risk of defective machinery which the master had promised to remedy. *Snowberg v. Nelson-Spencer Paper Co.*, 532.

See CONTRACT, 520.

MEASURE OF DAMAGES. See DAMAGES.**MECHANIC'S LIEN.**

- Who are subcontractors. One selling material to the dealer of whom the principal contractor bought it, *held* not a subcontractor nor entitled to a lien. *Merriman v. Jones*, 29.

MECHANIC'S LIEN—Continued.

Lien *held* to attach as an entirety to several buildings on one lot, when the material was furnished for all the buildings under one contract. *Glass v. St. Paul Carriage Co.*, 228.

Averment of complaint as to making and filing lien statement *held* sufficient as against a motion to strike out. *Id.*

Evidence *held* competent to show husband's authority to contract on his wife's behalf for the labor and material for which a lien on her property was claimed. *McCarthy v. Caldwell*, 442.

Requisites of description of premises in lien statement. False particular, when harmless. *N. W. Pavement Co. v. Norwegian Seminary*, 449.

In suit by subcontractor, the contractor is a necessary party. Remedy of owner if such contractor is not impleaded or not served. *Id.*

MISJOINDER. See PLEADING, 176.

MISNOMER. See CRIMINAL LAW, 273, 490; PRACTICE, 187.

MISTAKE. See PRINCIPAL AND AGENT, 382.

MONEY HAD AND RECEIVED. See PRINCIPAL AND AGENT, 382.

MORTGAGE.

Injunction, when granted to restrain waste by mortgagor. *Moriarty v. Ashworth*, 1.

Holder of overdue coupon interest note may sue to foreclose, though the principal debt is not due and the mortgage is held by another, who is made a party. *Cleveland v. Booth*, 16.

Conveyance of mortgaged land. First mortgage assumed by grantee, and second agreed to be paid by grantor. The grantor not being theretofore personally liable to pay the first mortgage, *held* that the grantee did not, by his covenant, incur personal liability to the first mortgagee. *Brown v. Stillman*, 126.

The holder of the purchaser's interest cannot tack a junior lien to it for purposes of redemption without redeeming from himself by virtue of the junior lien. *Buchanan v. Reid*, 172.

Purchaser at foreclosure sale *held* to be, during year for redemption, a "creditor having a lien," for purposes of redemption. *Id.*

Effect of mortgage to partnership in firm name. Foreclosure of such mortgage, under the power of sale, sustained. *Menage v. Burke*, 211.

Cestui que trust need not be made party to an action against legal owner of a mortgage to have it declared paid, nor is the assignor of the mortgage, who covenants that it is unpaid, a necessary party. *Redin v. Branhan*, 283.

Assignee of paid mortgage takes it subject to that defence, though it is not satisfied of record. *Id.*

A second mortgagee, having foreclosed under the power and purchased at the sale, may sue to have a prior mortgage adjudged paid, though the redemption year is not expired. *Id.*

Property used in connection with a manufacturing plant *held* to be included under general words of description. Effect is to be given to all words of the description, and the construction to be in the light of the facts known to the parties when making it. *Beaupre v. Dwyer*, 485.

One claiming, but not having, title voluntarily paid off a mortgage given by his grantor. *Held* not entitled to a lien for the amount paid. *Wadsworth v. Blake*, 509.

By infant wife, of her land, her husband joining, *held* valid. *Daley v. Minn. Loan, etc., Co.*, 517.

MORTGAGE—Continued.*Held* not usurious. *Id.*

Effect of release by the holder of a mortgage, to a grantee of the mortgagor, of that part of the lands primarily liable (as between him and his grantor) for the debt. Rights of subsequent *bona fide* purchaser from the releasee. *Groesbeck v. Mattison*, 547.

Effect of such release where such holder has notice of the agreement of the grantee to pay the entire mortgage debt. *Id.*

Recital in release that releasee is grantee of the mortgagor conclusively charges the mortgagee with notice of the contents of the deed to such grantee. *Id.*

Of personalty. See **CHATTEL MORTGAGE**.

MOTIONS AND ORDERS. See **PRACTICE**, 195, 534.

MUNICIPAL CORPORATION.

Ordinance regulating height of guy ropes across streets *held* inadmissible, in an action for negligently stretching such ropes across a street. *Larson v. Ring*, 88.

Grant of privileges by council does not give immunity for private injury resulting from their exercise. *Id.*

Power to prevent obstruction of street by carriages includes power to prevent obstruction by railway cars. *City of Duluth v. Mallett*, 204.

Ordinance prohibiting stopping of cars on street-crossing for switching purposes, *held* not unreasonable. *Id.*

Ordinance for licensing peddlers *held* not to delegate to the recorder the power to license, nor to the licensee the power to determine its duration, and not to fix an excessive fee. *In re White*, 250.

Provision in charter requiring unanimous consent to passage of an ordinance at the same meeting when introduced, etc., *held* not to require a unanimous vote on its final passage. *State v. Priestler*, 373.

Ordinance forbidding sale of liquor without license *held* valid as to sales of less than five gallons. Who may question its validity. *Id.*

Charter provision for licensing employment agencies *held* not repealed by a general law. Additional fee for making out license *held* unauthorized. *Moore v. City of Minneapolis*, 418.

Act changing limits, etc., *held* constitutional. *State v. Matson*, 438.

Ordinance of Winona *held* sufficient consent to laying a switch track. *Chicago, B. & N. R. Co. v. Porter*, 527.

MUNICIPAL COURT.

Complaint *held* not to show an equitable cause of action beyond the court's jurisdiction. *Fox v. Ellison*, 41.

Of St. Paul may vacate a judgment after transcript filed in the district court and execution issued. *Buffham v. Perkins*, 158.

Replevin for a deed, when within the jurisdiction, and when not. *Simmons v. Curtis*, 539.

NAME.

Presumption of identity of person from identity of name. *Morris v. McClary*, 346.

See **CRIMINAL LAW**, 273, 490; **PLEADING**, 180; **PRACTICE**, 137.

NEGLIGENCE.

Evidence of custom is not admissible to excuse an act negligent in itself. *Larson v. Ring*, 88. (Compare *O'Malley v. St. Paul, M. & M. Ry. Co.*, 289; *Larson v. Same*, 423.)

NEGLIGENCE—Continued.

City ordinance fixing height of guy ropes across streets *held* inadmissible in an action by one injured by such rope. *Id.*

Duty of owners of dangerous machinery to young children. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 289.

Child chargeable with parent's contributory negligence, but such negligence in this case *held* not in issue on the pleadings. *Id.*

Burden of showing connection between injury suffered and negligence charged. *Larson v. St. Paul & Duluth R. Co.*, 488.

One walking along street too near street-railway track *held* guilty of negligence. *Heffinger v. Minneapolis, etc., Ry. Co.*, 503.

See CARRIER, 279, 300; MASTER AND SERVANT, 42, 53, 208, 222, 268, 352, 532; RAILWAY, 289, 300, 319, 334, 414, 423, 519.

NEGOTIABLE INSTRUMENT.

Action on note wilfully destroyed by third person, sustained. *Homborg v. Kikhaffer*, 205.

Promise in writing to accept a bill, when and in whose favor deemed an acceptance. *Woodard v. Griffiths-Marshall Grain Co.*, 260.

With what notice a purchaser is chargeable, who is informed of the promise but does not see it. *Id.*

Action on note *held* not to lie, when the property, the sale of which was its sole consideration, had been retaken by the seller. *Aultman v. Olson*, 409.

The payee added to his indorsement a written guaranty of payment. *Held* that an assignment of the note by the indorsee passed the contract of guaranty. *Harbord v. Cooper*, 466.

NOTICE.

What notice must be given to an agent to make him liable if he pay over to his principal money paid him by mistake. Who may give such notice. *Shepard v. Sherin*, 382.

Of trial. See PRACTICE, 239.

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ORDINANCE. See MUNICIPAL CORPORATION, 88, 250, 373, 418, 527.**PARENT AND CHILD.**

Child chargeable with parent's contributory negligence. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 289.

PARTIES TO ACTIONS. See PLEADING, 180, 283, 297, 328, 449, 500.**PARTNERSHIP.**

Liability of joint agents as *quasi* partners for each other's acts, though one of them does all the business, and is alone interested in it. Account stated by one with the principal binds both. *Milwaukee Harvester Co. v. Finnegan*, 183.

Validity and effect of mortgage to partnership in firm name. Foreclosure by advertisement upheld. *Menage v. Burke*, 211.

Application of a payment by one partner *held* binding on copartner, who claimed that it should have gone to pay a debt of his own. *Flarsheim v. Brestrup*, 298.

Articles *held* not delivered, and no contract made. *Hill v. Webb*, 545.

See INSOLVENCY, 463.

PART-OWNERS. See WAREHOUSEMAN, 33.

PART-PERFORMANCE. See **CONTRACT**, 357.

PAYMENT.

Sureties on contractors' bond to plaintiff to pay laborers *held* not discharged by payment in full to contractors. *City of Duluth v. Heneg*, 155.

Debtor acquiescing in application of payment to extinguish one demand cannot afterwards assert that he directed a different application when making it. One partner *held* bound by application made by copartner. *Flarshelm v. Brestrup*, 298.

Voluntary payment of mortgage by one claiming but not having title, *held* not to entitle him to a lien. *Wadsworth v. Blake*, 509.

PLEADING.

Counterclaim for breach of contract *held* sufficient in an action on a note. *Burns v. Jordan*, 25.

In action to determine adverse claims, the pleadings alleging title generally, an execution sale, under which title is claimed, cannot be attacked for irregularity or fraud. *Duford v. Lewis*, 26.

Omission to claim immediate delivery does not change action of replevin into action for conversion. *Benjamin v. Smith*, 146.

Complaint against two defendants on the several contract of each is bad for misjoinder of causes of action. *Berg v. Stanhope*, 176.

Designation of parties by initials of Christian names is ground of motion for correction, but not for dismissal or reversal. *Kenyon v. Semon*, 180.

Averments of defects in locomotive in action by a fireman for personal injuries, *held* sufficiently certain. *Orth v. St. Paul, M. & M. Ry. Co.*, 208.

Averments in complaint as to making and filing mechanic's lien statement, *held* sufficient. *Glass v. St. Paul Carriage Co.*, 228.

Cestui que trust is not a necessary party in a suit against legal holder of a mortgage to have it adjudged paid. *Redin v. Branhan*, 283.

Nor is the assignor who has covenanted that the mortgage is unpaid a necessary party. *Id.*

Such action may be brought by a junior mortgagee who has foreclosed, though the redemption year has not expired. *Id.*

Who may bring suit to remove a cloud on title. *Id.*

Defendant sued by a child for injuries from its negligence *held* precluded by its specifications of contributory negligence in its answer from giving evidence of the parent's negligence; and this though such evidence may be given under a general denial. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 289.

Failure to file security for costs or to serve a copy of amount after demand, are not matters pleadable in the answer. *Henry v. Bruns*, 295.

Who may sue to avoid a conveyance for fraud on creditors. Requisites of complaint. *Sawyer v. Harrison*, 297.

Tax-payer may bring *mandamus* to compel assessment. *State v. Archibald*, 328.

Complaint *held* to be on special contract for building a house, and to preclude recovery for value of partial performance. *Elliott v. Caldwell*, 357.

In action by subcontractor to enforce a mechanic's lien, the principal contractor is a necessary party. *N. W. Paving Co. v. Norwegian Seminary*, 449.

Complaint by landlord against tenant for unlawful detainer *held* sufficient on appeal. *Dorr v. McDonald*, 458.

PLEADING—Continued.

In what cases citizens and tax-payers may sue for injunction against removal of county seat. *Todd v. Rustad*, 500.

POLICE POWER. See CONSTITUTION, 418.

POSSESSION.

Livery-stable keeper's lien depends on possession and is lost by surrender to the owner. *Ferriss v. Schreiner*, 148.

Of tenant as notice to a judgment creditor of the lessor's rights, but not of an unrecorded deed of lessor, though known to the tenant. *Wilkins v. Bevier*, 213.

Not needed to sustain an action to remove a cloud on title. *Redin v. Branhan*, 283.

Deed of several lots held not to extend actual possession of one lot so as to include the others. *Morris v. McClary*, 346.

Possession by one cotenant is not notice of the other's title. *Wilcox v. Leominster Nat. Bank*, 541.

POWER OF ATTORNEY. See CONVEYANCE, 246.

PRACTICE.

Irregularities in order for struck jury, and the absence of a written demand therefor, held waived. *Bennett v. Syndicate Ins. Co.*, 45.

The entire testimony of a witness at a former trial held properly admitted to impeach him. *Id.*

"Berlah" for "Beulah," in published summons, held not fatal to jurisdiction. *Lane v. Innes*, 137.

Affidavit of publication for "seven" weeks, but showing the dates of the first and last publication, and that six weeks was intended, held sufficient. *Id.*

The published summons was in the form prescribed for personal service with the complaint. Held not a jurisdictional defect. *Id.*

Omission to claim immediate delivery does not change action of replevin into action for conversion. *Benjamin v. Smith*, 146.

Power of municipal court to vacate judgment after transcript filed. *Buffham v. Perkins*, 158.

On appeal from a justice, a judgment of dismissal instead of affirmance held not prejudicial error. *Schroeder v. Harris*, 160.

Remedy of garnishee for excessive judgment against him by default must be sought in the same proceeding. *Segog v. Engle*, 191.

A motion for relief from a default cannot be renewed without leave or new facts, nor can successive motions be made on the same grounds. *Weller v. Hammer*, 195.

Exception to refusals to charge held too general. *State v. Adamson*, 196.

Improper remarks of counsel at trial must be shown by case or bill of exceptions, and not by affidavit. New trial for such cause held properly refused. *Id.* Objection to such remarks, how to be taken. *State v. Frelinghuysen*, 265.

A party is entitled as of right to notice of trial. Where an order granting a new trial is appealed from and affirmed, and the cause remanded, it must be again noticed for trial. *Mead v. Billings*, 239.

A right to have a cause stricken from the calendar is not waived by taking part in the trial after refusal of the court to strike from calendar or continue. *Id.*

In what cases a party may be allowed to cross-examine his own witness. *State v. Tall*, 273.

PRACTICE—Continued.

Motion to strike out testimony *held* too broad. *Id.*

New trial for newly-discovered evidence *held* properly refused, when the proposed witness had been offered at the trial by the other party and his testimony objected to and excluded. *Id.*

Where non-resident plaintiff fails to file security for costs, the objection must be taken by motion, and not by answer. The court may permit filing *nunc pro tunc*. *Henry v. Bruns*, 295.

Remedy of defendant when plaintiff has neglected, after demand, to serve a copy of his account. *Id.*

Power of court to correct clerical errors (in this case to substitute new findings and judgment) more than one year after judgment entered. *McClure v. Bruck*, 305.

Affidavit of service by publication being insufficient, a new affidavit may be allowed to be filed after judgment. *Burr v. Seymour*, 401.

Error in admitting in evidence a void city ordinance *held* cured by instruction to disregard it. Otherwise when the evidence is of facts. *Dugan v. St. Paul & Duluth R. Co.*, 414.

Admission that a certain entry was the "record of trains" *held* a waiver of preliminary proof. *Larson v. St. Paul, M. & M. Ry. Co.*, 423.

Remedy of defendant where a necessary party is not impleaded or is not served. *N. W. Pavement Co. v. Norwegian Seminary*, 449.

If charge of court as an entirety is sufficient, it is immaterial that parts of it, when detached, are incomplete. *Deisen v. Chicago, St. Paul, M. & O. Ry. Co.*, 454.

Where plaintiff has made a case for nominal damages which would carry costs, it is error to order dismissal. *Farmer v. Crosby*, 459.

Orders *held* proper (1) discharging a receiver, and (2) reserving the matter of his compensation for future action. *Joslyn v. Athens Coach & Car Co.*, 534.

PRESUMPTION.

Of solvency of a purchaser procured by a real-estate broker. *Grosse v. Cooley*, 188.

See EVIDENCE, 385; RAILWAY, 319, 334, 427, 519.

PRINCIPAL AND AGENT.

Writing signed by defendant, appointing plaintiff exclusive agent for sale of land, *held* not a contract, for want of mutuality, but conferring revocable authority. Acts of plaintiff *held* not to amount to agreement on his part. *Stensgaard v. Smith*, 11.

Liability of bank for default of its correspondent to whom it has sent a draft received by it from a customer for collection. *Stretssguth v. Nat. German-American Bank*, 50.

Principal's recognition of agent's acts as authorized *held* to bind him as to third persons dealing with the agent in reliance thereon. *Tice v. Russell*, 56.

Waiver of payment of premium by insurance agent *held* forbidden by terms of policy. *Wilkins v. State Ins. Co.*, 177.

Liability of joint agents for each other's acts (as for an account stated with the principal) though one of them alone does the business, and is alone interested in it. *Milwaukee Harvester Co. v. Finnegan*, 183.

Customer procured by a real-estate broker is presumed solvent and able to perform his contract. *Grosse v. Cooley*, 188.

Real-estate agent *held* not entitled to commission in a case where the cus-

PRINCIPAL AND AGENT—Continued.

- broker broke off the negotiations, and afterwards purchased directly of the owner. *Cullen v. Hall*, 226.
- Parol ratification of acts of agent in excess of his written power to sell and convey land. Parol modification by wife of terms of her and her husband's written power to sell and convey. Conveyance by attorney in such case *held* not void. *Dayton v. Nell*, 246.
- Purchase of goods by agent on credit *held* not binding on principal. And the use of such goods by the agent in payment of debts of the principal (which the agent was furnished with money to pay) does not make the principal liable. *Eckart v. Roehm*, 271.
- Bonus exacted by agent for lender *held* to make the loan usurious. *Lewis v. Willoughby*, 307.
- Liability of agent for money paid him for his principal by mistake, and by him paid over. What notice is necessary to charge the agent, and who may give it. *Shepard v. Sherin*, 382.
- Commission of broker employed to procure a loan on real estate, when earned. His employer impliedly agrees to tender good title. *Peet v. Sherwood*, 447.
- Evidence *held* to show an agent's authority to make the contract sued on. *Pulliam v. Adamson*, 511.
- Disability of agent to bind his principal by a contract made for the principal with himself. *Williams v. Journal Printing Co.*, 537.
- Parol evidence *held* inadmissible to show that one signing a contract in his own name contracted merely as agent. *Id.*

PRINCIPAL AND SURETY. See **BOND**, 155.**PROBATE COURT.** See **ESTATES OF DECEDENTS**; **GUARDIAN AND WARD**.**PROMISSORY NOTE.** See **NEGOTIABLE INSTRUMENT**.**PUBLICATION.** See **PRACTICE**, 137, 401; **TAXES**, 69, 493.**PUBLIC LAND.**

- One who makes entry and settlement under timber-culture act owns the hay made by him on the land, and may recover the value of it, and of the standing timber, when destroyed by a wrong-doer. Measure of damages in such case. His subsequent surrender of his claim does not affect his right of action. *Carner v. Chicago, St. Paul, M. & O. Ry. Co.*, 375.

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- Status of Iowa railway companies operating in this state. Fees for filing articles. *State v. Sioux City & Northern R. Co.*, 17.
- Obstruction of street-crossings in city. Ordinance forbidding *held* not unreasonable. *City of Duluth v. Mallett*, 204.
- Company *held* not liable for killing cattle unlawfully at large. *Johnson v. Minn. & St. Louis Ry. Co.*, 207.
- Duty of company to young children attracted to play on a turntable and trucks standing on the tracks. The company may show it exercised the precautions customary with all companies. *O'Malley v. St. Paul, M. & M. Ry. Co.*, 289. See *infra*, 423.
- Contributory negligence of parent, how to be pleaded. *Id.*
- Fire set by engine. Statutory presumption of negligence, how rebutted. Presumption *held* rebutted. *Daly v. Chicago, Mil. & St. Paul Ry. Co.*, 319. *Held* not rebutted. *Hoffman v. Chicago, Mil. & St. Paul Ry.*

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- Co.*, 334; *Doyscher v. Same.* 427; *Wilson v. Northern Pacific R. Co.*, 519.
- Held* not negligent in not having a bell-rope on a mixed train. *Oviatt v. Dakota Central Ry. Co.*, 300.
- Guardian's sale and conveyance to company. Effect of approval and confirmation by probate court. *Burrell v. Chicago, Mil. & St. Paul Ry. Co.*, 363.
- Blowing of whistle in city. Negligence a question for the jury. *Dugan v. St. Paul & Duluth R. Co.*, 414.
- On question of negligence in running extra trains without notice to section-men, the company may show a general custom so to do. *Larson v. St. Paul, M. & M. Ry. Co.*, 423. See *supra*, 289.
- Fence *held* not within statute punishing removal of railway structures. *State v. Walsh*, 444.
- Coal-shoveller killed while unloading car. Question of negligence *held* to be for the jury. *Deisen v. Chicago, St. Paul, M. & O. Ry. Co.*, 454.
- Compensation payable to company for laying a highway across its tracks. Duty of company to construct crossings for new highways. *State v. Shardlow*, 524.
- City ordinance *held* to authorize switch track. *Chicago, B. & N. R. Co. v. Porter*, 527.

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- When it lies against sheriff for property levied on. *Whitney v. Swensen*, 337.
- Lies for deed, though delivery be disputed. In what cases replevin for a deed can, and when it cannot, be brought in municipal court. *Simonsen v. Curtis*, 539.

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- Acceptance *held* to waive objections for premature delivery and inferiority to sample. *Lee v. Banks*, 23.
- By warehouseman, of wheat in warehouse; when lawful; when a conversion. *Hall v. Pillsbury*, 33.
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Where, on a conditional sale, the seller has retaken the property, he cannot sue on a note given for the price. *Aultman v. Olson*, 409.

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Of timber-culture claim *held* not to affect existing right of action for destruction of trees and hay. *Carner v. Chicago, St. Paul, M. & O. Ry. Co.*, 375.

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TAXES.

Statement of amount payable and rate of interest in redemption notice *held* sufficient, the errors being trivial. *Robert v. Western Land Ass'n*, 3.

A general description in a tax-deed that may be satisfied by applying it to land owned by one party, in whose name it is assessed, will not be extended to embrace land of another, thus leading to double taxation. *Eastman v. St. Anthony Falls W.-P. Co.*, 60.

Description of riparian land in tax-deed *held* not to embrace submerged land. *Id.*

Description in published delinquent list *held* not a copy of original, and not definite and certain enough to sustain the judgment. *Olivier v. Gurney*, 69.

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VENDOR AND PURCHASER.

Where purchaser, prior to time for first payment and delivery of deed, notifies vendor that he cannot perform for want of funds, the vendor need not furnish abstract or deed, nor is it material that there is a cloud on the title which the vendor is able and willing to remove. *So held* in suit by vendor to cancel contract. *Johnston v. Johnson*, 5.

Distinction between power to sell and power to convey, in that the former may be created or modified, and acts in excess of it ratified, by parol. Conveyance in excess of power *held* voidable only. Parol modification by wife of written power from her and her husband to sell and convey her land. *Dayton v. Nell*, 246.

On a sale of real and personal property for a gross price, a vendor's lien does not arise, nor does it when the consideration of a sale of realty is of uncertain value. *Peters v. Tunell*, 473.

Criterion of "marketable title." Title *held* unmarketable because depending on evidence that the land was a homestead. *Richmond v. Koenig*, 480.

Interest of purchaser, who has entered, made improvements, and paid part of the price, *held* liable to levy and sale on execution. What description in the levy and certificate of sale will be sufficient, and what will pass under it. *Reynolds v. Fleming*, 513.

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Deposit of grain is a bailment, and receipt-holder is an owner in common of the mass, though the grain deposited by him has been removed and other grain substituted. *Hall v. Pillsbury*, 33.

In what cases the warehouseman is also a part-owner of the mass of grain. Limit of his interest. In what cases a sale by him is lawful, and in what cases it is a conversion. *Id.*

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The riparian right to reclaim the land under navigable waters, below low-water mark, may be conveyed separately from the riparian estate. *Hanford v. St. Paul & Duluth R. Co.*, 104.

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Lakes wholly within the state are not within the U. S. admiralty jurisdiction. Power of state to provide for creation and enforcement of liens upon vessels navigating them. *Stapp v. Steamboat Clyde*, 192.

Duty of owners of dam across the Mississippi river, authorized by congress and the state, to protect it from injuries from jams of logs caused by slack-water created by the dam. *St. Cloud W. P. Co. v. Miss. & Rum Ricer Boom Co.*, 380.

Defendant held liable for injuries to plaintiff's house caused by discharge of rain water by pipes from his roof, on his own land near the division line between his land and plaintiff's. *Beach v. Gaylord*, 476.

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"Creditor having a lien," and therefore entitled to redeem from foreclosure sale. *Buchanan v. Reid*, 172.

"Driven" down a river, in law as to logs. *St. Louis Dalles Improvement Co. v. C. N. Nelson Lumber Co.*, 130.

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